DOCKET

No. 13-1352

Title:	Ohio, Petitioner
	v.
	Darius Clark
Docketed:	May 12, 2014
Linked with 13A930	
Lower Ct:	Supreme Court of Ohio
Case Nos.:	(2012-0215)
Decision Date:	October 30, 2013
Rehearing Denied:	December 24, 2013

Questions Presented

---Date---	------Proceedings and Orders----------
Dec 11 2013	Application (13A930) to extend the time to file a petition for a writ of certiorari from March 24, 2014 to May 8, 2014, submitted to Justice Kagan.
Mar 13 2014	Application (13A930) granted by Justice Kagan extending the time to file until May 8, 2014.
May 8 2014	Petition for a writ of certioran filed. (Response due June 11, 2014)
May 8 2014	Appendix of Ohio filed.
May 30 2014	Order extending time to file response to petition to and including July 11, 2014.
Jun 5 2014	Brief amicus curiae of Ohio Prosecuting Attorneys Association filed.
Jun 9 2014	Brief amicus curiae of American Professional Society on the Abuse of Children filed.
Jun 11 2014	Brief amicus curiae of Domestic Violence Legal Empowerment & Appeals Project (DV LEAP) filed.
Jun 11 2014	Brief amici curiae of Washington, et al. filed.
Jul 1 2014	Brief of respondent Darius Clark in opposition filed.
Jul 1 2014	Motion for leave to proceed in forma pauperis filed by respondent Darius Clark.
Jul 16 2014	DISTRIBUTED for Conference of September 29, 2014.
Jul 17 2014	Reply of petitioner Ohio filed. (Distributed)
Oct 2 2014	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Oct 2 2014	Petition GRANTED.
Oct 22 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Oct 22 2014	Motion to appoint counsel filed by respondent Darius Clark.
Oct 22 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Oct 29 2014	Motion DISTRIBUTED for Conference of November 14, 2014.
Nov 17 2014	Motion to appoint counsel filed by respondent GRANTED. Jeffrey L. Fisher, Esquire, of Stanford, California, is appointed to serve as counsel for the respondent in this case.

Nov 17 2014	Brief of petitioner Ohio filed.
Nov 17 2014	Joint appendix filed. (Statement of costs filed.)
Nov 21 2014	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Nov 21 2014	Brief amici curiae of New Mexico, and National District Attorneys Association filed.
Nov 24 2014	Brief amicus curiae of Domestic Violence Legal Empowerment & Appeals Project (DV LEAP) filed.
Nov 24 2014	Brief amicus curiae of United States filed.
Nov 24 2014	Brief amicus curiae of Child Justice, Inc. filed.
Nov 24 2014	Brief amici curiae of National Education Association, et al. filed.
Nov 24 2014	Brief amici curiae of Ohio Prosecuting Attorneys Association, et al. filed.
Nov 24 2014	Brief amici curiae of Fern L. Nesson and Charles R. Nesson filed.
Nov 24 2014	Brief amicus curiae of American Professional Society on the Abuse of Children filed.
Nov 24 2014	Brief amici curiae of Washington, et al. filed.
Dec 4 2014	The time to file respondent's brief on the merits is extended to and including January 7, 2015.
Dec 11 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 22 2014	SET FOR ARGUMENT ON Monday, March 2, 2015
Dec 22 2014	Record requested from Supreme Court of Ohio.
Jan 7 2015	CIRCULATED.
Jan 7 2015	Brief of respondent Darius Clark filed. (Distributed)
Jan 12 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 12 2015	Record received from Supreme Court of Ohio, the record is electronic.
Jan 14 2015	Brief amicus curiae of Innocence Network filed. (Distributed)
Jan 14 2015	Brief amici curiae of Arizona Attorneys for Criminal Justice, et al. filed. (Distributed)
Jan 14 2015	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Jan 14 2015	Brief amici curiae of Family Defense Center and Other Advocates for Families filed. (Distributed)
Jan 14 2015	Brief amici curiae of Richard D. Friedman and Stephen J. Ceci filed. (Distributed)
Jan 14 2015	Brief amici curiae of Southwestern Law Student Bernadette M. Bolan, Professors Norman M Garland, and Michael M. Epstein, et al. filed. (Distributed)
Jan 30 2015	Record received from Ohio 8th District Court of Appeals, Cuyahoga County, 1-Box.
Feb 4 2015	Reply of petitioner Ohio filed. (Distributed)
Mar 2 2015	Argued. For petitioner: Matthew Edmund Meyer, Assistant Prosecuting Attorney, Cleveland, Ohio; and Ilana Eisenstein, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Jeffrey L. Fisher, Stanford, Cal.
Jun 18 2015	Judgment REVERSED and case REMANDED. Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, Sotomayor, and Kagan, JJ., joined. Scalia, J., filed an opinion concurring in the judgment, in which Ginsburg, J., joined. Thomas, J., filed an opinion concurring in the judgment.

PETITION FOR WRIT OF CERTIORARI

13-1352

No. 13-____

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In all fifty States, certain individuals—most often, teachers, social workers, and medical professionals—have a mandatory duty to report suspected child abuse that they notice in the course of their work. In this case, the Ohio Supreme Court held both that this mandatory-reporting duty turned day-care teachers into "agents of the state for law-enforcement purposes" and that a child's out-of-court statements to the teachers qualified as "testimonial" under the Confrontation Clause. It did so even though there was no police involvement in the encounter between the teachers and child. Several other state supreme courts, by contrast, have rejected arguments that these mandatory-reporting statutes turn an individual subject to them into "law enforcement," and have held instead that a child's statements to the individual were non-testimonial and thus not subject to the Confrontation Clause.

The two questions presented are:

1. Does an individual's obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?

2. Do a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

LIST OF PARTIES

The Petitioner is the State of Ohio. The Respondent is Darius Clark.

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OPINIONS BELOW

The Supreme Court of Ohio's order denying reconsideration, *State v. Clark*, 999 N.E.2d 698 (Ohio 2013), is reproduced at Pet. App. 49a. The Supreme Court of Ohio's opinion, *State v. Clark*, 999 N.E.2d 592 (Ohio 2013), is reproduced at Pet. App. 1a. The opinion of the Eighth District Court of Appeals of Ohio, *State v. Clark*, No. 96207, 2011 WL 6780456 (Ohio Ct. App. Dec. 22, 2011), is reproduced at Pet. App. 51a.

JURISDICTIONAL STATEMENT

The Supreme Court of Ohio entered its judgment in this case on October 30, 2013. The State filed a motion for reconsideration, which was denied on December 24, 2013. On March 13, 2014, Justice Kagan granted a 45-day extension of time to file this petition for writ of certiorari until May 8, 2014. The State of Ohio invokes the Court's jurisdiction under 28 U.S.C. § 1257. The Supreme Court of Ohio's decision qualifies as a "[f]inal judgment or decree[]" within the meaning of that statute. *Id.*; *see Michigan v. Bryant*, 131 S. Ct. 1143, 1151-52 (2011) (granting review when state supreme court found Confrontation Clause violation and remanded for new trial); *see also Kansas v. Marsh*, 548 U.S. 163, 168 (2006); *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him."

Section One of the Fourteenth Amendment to the United States Constitution provides in relevant part:

"No State shall deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Darius Clark Physically Assaulted His Girlfriend's Minor Children

The defendant, Darius Clark, began living with his girlfriend, T.T., in 2008. Pet. App. 19a. T.T. had two young children, L.P., her three-year-old son, and A.T., her two-year-old daughter. Late at night on March 16, 2010, T.T. left on a trip to Washington, D.C., leaving her children in Clark's care. *Id.* Around 1:00 p.m. the next day, Clark dropped off L.P at the William Patrick Day Head Start Center. Pet. App. 3a, 20a. Soon thereafter, in the Center's lunchroom, one of L.P.'s daycare teachers, Ramona Whitley, noticed that his left eye appeared bloodshot or bloodstained. Pet. App. 3a. She asked him, "What happened?" *Id.* L.P. eventually responded that he "fell." *Id.* Whitley then asked how he had "fall[en] and hurt [his] face." Pet. App. 4a. L.P. again simply said, "I fell down." *Id.* Whitley also noticed that L.P. was much less talkative than usual and that he refused to eat anything. Pet. App. 20a.

When Whitley saw L.P. in the brighter classroom setting, she noticed additional red marks that looked like "whips of some sort" and welts on his face. Pet. App. 4a, 20a. At this point, Whitney was "kind of like in shock" and asked L.P. again "what happened?" Pet. App. 20a. Whitley then told the class's lead teacher, Debra Jones, about L.P.'s injuries. Pet. App. 4a. When she saw L.P.'s injuries, Jones asked L.P., "Whoa, what happened?" and "Who did this?"

Pet. App. 4a, 20a. According to Jones, L.P. "seemed kind of bewildered. He said something like Dee, Dee." *Id.* At that time, the teachers did not know what L.P. meant by this statement. They wanted to know whether L.P had been talking about another child in the class. So Jones asked L.P. if Dee was "big or little." Pet. App. 21a. L.P. responded, "Dee is big." *Id.* It is now undisputed that Clark's nickname is "Dee." Pet. App. 53a.

Jones then took L.P. to her supervisor. Pet. App. 4a, 21a. The supervisor raised L.P.'s shirt, and saw additional red marks on his body. Pet. App. 21a. She concluded that whoever saw L.P. first should "make the call" to the Cuyahoga County Department of Children and Family Services ("CCDCFS") reporting a suspicion of child abuse. Pet. App. 4a, 21a. "As a result, Whitley called 696-KIDS and made a report of suspected child abuse." Pet. App. 4a.

A CCDCFS social worker subsequently arrived at the school. *Id.* The social worker asked L.P. about his injuries, and L.P again implicated Clark in response. Pet. App. 61a. Shortly after the social worker arrived, Clark also returned to the daycare center. Pet. App. 4a. He denied responsibility for the injuries, and left with the child. *Id.* The social worker tried to stop Clark, but could not do so and was unable to write down the license-plate number for Clark's car quickly enough. Pet. App. 21a. CCDCFS was unable to locate L.P. until the next day. *Id.* Ultimately, a different social worker found L.P. and his sister, A.T., at Clark's mother's house. Pet. App. 4a. That social worker confirmed L.P.'s injuries and "discovered very serious injuries on A.T., including two

black eyes and a large burn on her cheek." Pet. App. 21a. When speaking with this social worker, L.P. again implicated Clark in the physical abuse. Pet. App. 58a-59a. The social worker called 911, and took both children to the hospital after the police arrived at the house. Pet. App. 4a, 21a.

At the hospital, "[a] physician determined that L.P had bruising in various stages of development and abrasions consistent with having been struck by a linear object and that A.T. had bruising, burn marks, a swollen hand, and a pattern of sores at her hairline." Pet. App. 4a-5a. "The physician suspected child abuse and estimated that the injuries occurred between February 28 and March 18, 2010." Pet. App. 5a.

B. A Jury Convicts Clark, But The Ohio Supreme Court Affirms The Reversal Of His Conviction On Confrontation Clause Grounds

1. A grand jury indicted Clark on one count of felonious assault relating to L.P., four counts of felonious assault relating to A.T., two counts of endangering children, and two counts of domestic violence. Pet. App. 5a. The jury also indicted T.T., the children's mother, on similar charges. Pet. App. 19a n.1. She pleaded guilty to charges of child endangerment, domestic violence, and permitting child abuse, and also agreed to testify against Clark at his trial. *Id.* Ultimately, she was sentenced to eight years' imprisonment for these convictions. *Id.*

At Clark's trial, the trial court declared L.P. incompetent to testify under state law because of his

young age. Pet. App. 5a. Clark had also argued that L.P.'s statements identifying Clark as the abuser were "testimonial" and thus triggered the Confrontation Clause's prohibition on admitting out-of-court statements without a prior ability to cross examine the declarant. Pet. App. 19a. Rejecting the objections to the testimony, the trial court ultimately allowed seven witnesses to testify as to what L.P. stated concerning who had injured him, including the two daycare teachers (Whitley and Jones), the two social workers who met with L.P at his school and at the house of Clark's mother, the police officer who responded to the social worker's 911 call and spoke with L.P. at the hospital, and the child's grandmother and great aunt. Pet. App. 5a. The jury found Clark guilty of all charges but one relating to A.T., and the trial court sentenced Clark to an aggregate total sentence of 28-years' imprisonment. *Id.*

2. On appeal, the Eighth District Court of Appeals reversed Clark's conviction and remanded for a new trial. Pet. App. 52a. The appellate court initially held that the testimony by five of the seven witnesses about what L.P. had told them, including the testimony of the police officer, the social workers, and the teachers, all violated Clark's Confrontation Clause rights. Pet. App. 55a-63a.

With respect to L.P.'s out-of-court statements to *the teachers*, the court concluded that the statements were testimonial (and thus subject to the Confrontation Clause) because "the primary purpose of Jones and Whitley questioning L.P. was to report potential child abuse to law enforcement." *Id.* The court of appeals reached that conclusion because "[b]oth

teachers testified that their obligation to report [suspected child abuse] is mandatory," and because a reasonable witness could thus "expect that statements made to a teacher while she is reporting suspected child abuse may be used at a later trial." *Id.*

The court next reviewed "L.P.'s statements to [his] grandmother and great aunt" under Ohio Evid. R. 807, which permits the admission of a child's out-of-court statements concerning child abuse if certain requirements are met. Pet. App. 63a. The court held that L.P.'s statements to his grandmother and great aunt "lacked the 'particularized guarantees of trustworthiness'" necessary to permit admission under the rule. Pet. App. 68a. Because it had already concluded that L.P.'s separate statements to his teachers were testimonial, however, the court did not consider whether they also would have been inadmissible under Ohio Evid. R. 807. *See* Pet. App. 63a-69a.

3. The State filed a discretionary appeal with the Ohio Supreme Court, challenging the Eighth District's ruling that the admission of L.P.'s out-of-court statements to his two daycare teachers violated the Confrontation Clause. In a sharply divided 4-3 decision, the Ohio Supreme Court affirmed. *See* Pet. App. 17a.

The majority recognized that, as this Court held in *Davis v. Washington*, 547 U.S. 813 (2006), and again in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), the Confrontation Clause applies only to "testimonial" statements. Pet. App. 2a; *see* Pet. App. 10a-12a. And *Davis*, the majority further noted, "enunciated the primary-purpose test to determine whether a statement made to a law-enforcement officer or an

agent of law enforcement in the course of an investigation is testimonial" in nature. Pet. App. 2a; *see* Pet. App. 11a. Under this test, statements are not testimonial if their primary purpose is to enable police assistance with an ongoing emergency, but they are testimonial if their primary purpose is to establish or prove past events potentially relevant to later criminal prosecution. Pet. App. 2a-3a (citing *State v. Siler*, 876 N.E.2d 534 (Ohio 2007)).

Applying these rules to the facts presented here, the majority first held that Jones and Whitley (the two daycare teachers) qualified as law-enforcement agents because "Ohio law imposes a duty on all school officers and employees, including administrators and employees of child day-care centers, to report actual or suspected child abuse or neglect." Pet. App. 6a (citing Ohio Rev. Code § 2151.421). While "'the primary purpose of reporting is to facilitate the protection of abused and neglected children rather than to punish those who maltreat them,'" the majority reasoned, "'*it is clear that the General Assembly considered identification and/or prosecution of the perpetrator to be a necessary and appropriate adjunct in providing such protection,* especially in the institutional setting.'" Pet. App. 7a-8a (quoting *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861, 865 (Ohio 2004)). Accordingly, the majority held that "[w]hen teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator" under this mandatory-reporting statute, "any statements obtained are testimonial for purposes of the Confrontation Clause." Pet. App. 9a.

The majority next held that the primary purpose of L.P.'s statements to the teachers showed that the statements were testimonial in nature and thus subject to the Confrontation Clause. Pet. App. 8a-9a, 15a-16a. It concluded that "no ongoing emergency existed, nor had L.P. complained about his injuries or needed emergency medical care"; instead, the teachers merely "acted to fulfill their duties to report abuse" when they questioned him about his injuries. Pet. App. 15a. Indeed, Whitley expressly testified that she is trained to look for suspected child abuse when children visit the daycare center. *Id.* Accordingly, the majority said that, "[a]t a minimum, when questioning a child about suspected abuse in furtherance of a duty pursuant to [Ohio Rev. Code §] 2151.421, a teacher acts in a dual capacity as both an instructor and as an agent of the state for law-enforcement purposes." *Id.* The majority also suggested that the teachers questioned L.P. away from other students "in a formal question-and-answer format," seeking "facts concerning past criminal activity to identify the person responsible." Pet. App. 16a. And, according to the majority, L.P.'s statements were "'functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.'" *Id.* (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-311 (2009)).

Chief Justice O'Connor drafted a vigorous dissent. Pet. App. 18a-47a. The dissent initially criticized the majority for suggesting that its conclusion followed from this Court's binding precedent. Pet. App. 23a-25a. In both *Davis* and *Bryant*, the dissent pointed out, this Court had expressly left open whether the Confrontation Clause applies *at all* to

statements to non-law enforcement. Pet. App. 24-25a (citing *Bryant*, 131 S. Ct. 1155 n.3; *Davis*, 547 U.S. at 823 n.2). "[C]ontrary to the majority's suggestion that *Davis* compels the conclusion that L.P.'s statements to his teachers were testimonial," the dissent reasoned, "the United States Supreme Court has yet to decide under what circumstances statements are testimonial when they are made to someone other than law-enforcement personnel." Pet. App. 25a. The Ohio Supreme Court, by contrast, had considered that question. It applied an "objective-witness test" to "statements made to someone other than law-enforcement personnel," one that treats those statements as non-testimonial unless "an objective witness would reasonably believe that the questioning served primarily a prosecutorial purpose." Pet. App. 26a (citing *State v. Stahl*, 855 N.E.2d 834, 844 (Ohio 2006)).

The dissent next criticized the majority's conclusion that L.P.'s statements to his teachers should be considered statements to law enforcement because of the teachers' mandatory-reporting obligations. Pet. App. 30a-39a. To begin with, the teachers were employed by a private non-profit entity (the Council for Economic Opportunities of Greater Cleveland, which operates the Head Start program at the William Patrick Day Services Center), not by a law-enforcement agency. Pet. App. 30a. And law enforcement had no role in any of the teachers' questions to L.P. *Id.*

Thus, the majority could rely *only* on the mandatory-reporting statute to hold that these teachers acted as law enforcement. *Id.* at 31a. But that statute did not deputize them, the dissent concluded, be-

cause "'the primary purpose of reporting is to facilitate the protection of abused and neglected children,'" and any "prosecutorial purpose is secondary." *Id.* at 33a (quoting *Yates*, 808 N.E.2d at 865). And that is a duty that all school teachers already have—"'to protect those children committed to their care and control.'" Pet. App. 35a (citation omitted). In other words, the dissent noted that teachers "have a professional responsibility upon observing a student's injuries to inquire about those injuries, to protect that child and the other children in the classroom, and to maintain a safe and structured environment in which learning can take place." Pet. App. 36a. The majority's reliance on the mandatory-reporting statute was all the more troubling, the dissent concluded, because it created a conflict with several other appellate courts, which had "held that a mandatory reporter is not an agent of law enforcement when there is little or, as here, no police involvement." Pet. App. 37a-39a (citing *United States v. Squire*, 72 M.J. 285 (C.A.A.F. 2013); *Seely v. State*, 282 S.W.3d 778 (Ark. 2008); *State v. Spencer*, 169 P.3d 384 (Mont. 2007); *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007)).

Applying the objective-witness test, the dissent concluded that the teachers "questioned L.P. to protect him and to maintain a safe and structured classroom, not to create evidence for use at Clark's trial." Pet. App. 39a-40a. The questioning occurred in a classroom; it was informal and spontaneously arose from seeing L.P.'s injuries; and the teachers were concerned that another classmate might have injured L.P. Pet. App. 40a-42a. In short, "[t]he teachers' questions allowed them to determine whether

something was happening in the classroom or on the school grounds that they needed to address." Pet. App. 41a-42a.

The dissent concluded by "invit[ing] [this Court] to now address the issues that it reserved in *Davis* and to provide uniform guidance on the issue of the effect, for Confrontation Clause purposes, of a duty to report child abuse." Pet. App. 47a. The dissent emphasized its "hope that four justices vote to accept [its] invitation," because, without immediate intervention, it said that "[c]hildren in Ohio will go unprotected." *Id.* Indeed, the majority's holding was troubling because it "treat[ed] differently out-of-court statements made by those who are the most vulnerable and the most in need of protection from those made by most adults." Pet. App. 45a.

REASONS FOR GRANTING THE WRIT

For several reasons, the Court should grant the petition for writ of certiorari to review the Ohio Supreme Court's decision in this case. *First*, the Court's guidance is needed because its prior cases have yet to consider whether or when statements to individuals other than law enforcement qualify as "testimonial" within the meaning of the Confrontation Clause. *Second*, in light of that lack of guidance, it should be unsurprising that the Ohio Supreme Court's decision conflicts with numerous decisions from other state supreme courts considering mandatory-reporting statutes. *Third*, the petition raises an often recurring legal issue that implicates the most compelling of concerns—child safety. *Fourth*, this case provides a good vehicle for the Court to consider this important question.

I. THE COURT HAS PROVIDED LITTLE GUIDANCE ON HOW THE CONFRONTATION CLAUSE APPLIES TO STATEMENTS TO NON-LAW ENFORCEMENT

As an initial matter, the Court's review is sorely needed because its prior cases leave lower courts with little guidance on the method to resolve the recurring and important question presented by this case—when, if ever, statements to private individuals who are not law enforcement qualify as "testimonial" and thus trigger the Confrontation Clause.

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court held that this provision prohibits the admission *only* of those out-of-court statements that are "testimonial" if the defendant lacked a prior opportunity to cross-examine the declarant. *Id.* at 68. As for the important definition of "testimonial," *Crawford* explained that it at least includes *both* out-of-court statements made in "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" *and* out-of-court statements made during "police interrogations." *Id.* But *Crawford* refrained from providing a "comprehensive definition" of the term, leaving its definition to be fleshed out on a case-by-case basis. *Id.* at 68 n.10. After *Crawford*, the Court has elaborated on the meaning of "testimonial" in only two contexts—neither of which directly applies to the question presented here.

Statements To Law-Enforcement Responders. The Court has twice considered when a declarant's out-of-

court statements *to law-enforcement agents* responding to requests for help qualify as "testimonial." *See Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011); *Davis v. Washington*, 547 U.S. 813, 817 (2006). In that context, the Court has held that the dividing line between testimonial and non-testimonial turns on the purpose of the statement. When "the primary purpose of [a] [law-enforcement] interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus" statements to police made during that interrogation are not testimonial. *Bryant*, 131 S. Ct. at 1155. When, by contrast, no ongoing emergency exists and the statements are made with a "primary purpose of creating an out-of-court substitute for trial testimony," the statements are "testimonial" and thus within the scope of the Confrontation Clause. *Id.*

The Court has applied this dichotomy to three discrete sets of facts. As an initial matter, the Court has found to be "testimonial" (and thus subject to the Confrontation Clause) certain statements that a wife made to a police officer about her husband's abuse after the abuse had ended and after the police had separated the couple. *Davis*, 547 U.S. at 820, 829-32. The wife made her statements during the officer's questioning about her version of events; indeed, "[a]fter hearing [the wife's] account, the officer 'had her fill out and sign a battery affidavit.'" *Id.* at 820 (citation omitted). The Court found it "clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct—as, indeed, the testifying officer expressly acknowledged"—and that "[t]here was no emergency in progress." *Id.* at 829-30.

The Court, by contrast, has found that a woman's statements to a 911 operator that her former boyfriend was physically abusing her were not "testimonial." *Id.* The Court indicated that "[a] 911 call, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." *Id.* at 827. The woman faced an "ongoing emergency" and her statements sought "help against bona fide physical threat." *Id.* "She simply was not acting as a witness; she was not testifying." *Id.*

Similarly, the Court has found that a shooting victim's statements to police who were called to assist him were not "testimonial" because an ongoing emergency continued at the time they encountered him at a gas station. *See Bryant*, 131 S. Ct. at 1162-67. Among other things, the Court highlighted that the police did not know the location of the shooter, that a gun was involved, that the declarant's statements were made while "lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen," that the questions asked of him were precisely the type of questions necessary to assess the emergency, and that the "situation was fluid and somewhat confused." *Id.*

Forensic Reports. Aside from considering statements to law-enforcement responders, the Court has repeatedly considered when statements made in various types of reports qualify as "testimonial." In that context, the Court has held that scientific statements included in forensic reports that were "created specifically to serve as evidence in a criminal proceeding"

qualify as "testimonial" and are thus subject to the Confrontation Clause. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709 (2011). Applying this rule, the Court has treated as testimonial a statement in a report concluding that particular white powder was cocaine, *see Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009), and a statement in a report concluding that a particular driver's blood-alcohol concentration was well above a State's legal limit, *see Bullcoming*, 131 S. Ct. at 2709.

The Court, by contrast, has noted that ordinary "business and public records" would not generally be testimonial because they "'hav[e] been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.'" *Id.* at 2714 n.6. And at least a plurality has held that a DNA report designed to help the police investigate a rape was not testimonial because its "primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against [the defendant], who was neither in custody nor under suspicion at that time." *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012) (plurality op.); *see also id.* at 2260 (Thomas, J., concurring in judgment) (finding that the report was not testimonial because it "lack[ed] the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact").

Statements to Non-Law Enforcement. As this discussion shows, the Court has not yet considered the scope of the term "testimonial" in a case, like today's case, involving out-of-court statements to individuals who are not law enforcement.

To begin with, the Court has expressly left open whether those statements can *ever* qualify as testimonial. In *Crawford*, the declarant's out-of-court statements were *to police* during a formal interrogation, so the Court did not consider the question. *See* 541 U.S. at 65-66. In *Davis*, the relevant statements were to police and to a 911 operator (whom the Court assumed, for purposes of the opinion, to qualify as a law-enforcement agent). *See* 547 U.S. at 823 n.2. Thus, the *Davis* Court expressly refrained from considering "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Id.* The relevant statements in *Bryant* were likewise to police, and so the Court again expressly noted that it had "no need to decide that question" concerning statements to non-law enforcement. 131 S. Ct. at 1155 n.3; *see also id.* at 1169 n.1 (Scalia, J., dissenting) ("I remain agnostic about whether and when statements to nonstate actors are testimonial.").

Even if some version of the "primary purpose" test should apply to statements to non-law enforcement, moreover, the Court has given seemingly conflicting instructions on the scope of that test. On the one hand, the Court has indicated that "if a statement is not made for 'the primary purpose of creating an *out-of-court substitute for trial testimony*,' its admissibility 'is the concern of state and federal rules of evidence, not the Confrontation Clause.'" *Williams*, 132 S. Ct. at 2243 (plurality op.) (quoting *Bryant*, 131 S. Ct. at 1155) (emphasis added). And when discussing this test, the Court has noted that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with

a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155. In the context of spousal abuse, for example, it has suggested that a spouse's "[s]tatements to *friends and neighbors* about abuse and intimidation and statements to *physicians* in the course of receiving treatment would be excluded, if at all, only by hearsay rules" rather than the Confrontation Clause. *Giles v. California*, 554 U.S. 353, 376 (2008) (emphases added); *cf. Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring) (noting that the State "has not claimed that the report was necessary to provide [the defendant] with medical treatment"); *Melendez-Diaz*, 557 U.S. at 312 n.2 (noting that "medical reports created for treatment purposes" "would not be testimonial under our decision").

On the other hand, some of the Court's other cases articulate a seemingly broader "primary purpose" test—suggesting that the Confrontation Clause covers not just statements made to "'creat[e] an out-of-court substitute for trial testimony,'" *Williams*, 132 S. Ct. at 2243 (plurality op.), but also statements made to "establish[] or prov[e] past events potentially relevant to later criminal prosecution,'" *Bullcoming*, 131 S. Ct. at 2714 n.6 (quoting *Davis*, 547 U.S. at 822). And the Court has also distinguished—rather than rejected—a common-law case, *King v. Brasier*, 168 Eng. Rep. 202, 202-03 (K.B. 1779), that overturned a conviction based on a child's out-of-court statements to her *mother* soon after the child had been sexually assaulted. *See Davis*, 547 U.S. at 828; *compare Bryant*, 131 S. Ct. at 1155 n.3 (criticizing dissent's reliance on *Brasier*), *with id.* at 1173 (Scalia, J., dissenting) (suggesting that, under the

majority's approach, *Brasier* likely would have come out differently because the "mother likely listened to the account to assess the threat to her own safety and to decide whether the rapist posed a threat to the community that required the immediate intervention of the local authorities").

In sum, the Court should grant the petition for writ of certiorari because its previous cases provide lower courts with little guidance over how to treat out-of-court statements to private individuals.

II. THE OHIO SUPREME COURT'S DECISION CONFLICTS WITH THE DECISIONS OF MANY OTHER APPELLATE COURTS

The Court should also grant the petition for writ of certiorari because the Ohio Supreme Court's decision conflicts in two key respects with decisions from other courts. First, the Ohio Supreme Court held that L.P.'s daycare "teachers acted as agents of the state for law-enforcement purposes" because they had a mandatory duty to report suspected child abuse. Pet. App. 15a-16a. Second, the court held that the statements L.P. made to those teachers were testimonial under the Confrontation Clause. As the dissent below expressly noted, *see* Pet. App. 36a-37a, the Ohio Supreme Court's reasoning departs from other cases that reject identical arguments on similar facts. Indeed, "[c]ourts in other jurisdictions have held that the mere fact of a declarant making a hearsay statement to a statutorily defined mandatory reporter does not make the statement testimonial." *People v. Phillips*, 315 P.3d 136, 165 (Colo. Ct. App. 2012). The majority did not even

cite—let alone attempt to distinguish—any of these decisions. *See* Pet. App. 6a-16a.

To begin with, the Montana Supreme Court rejected a defendant's reliance on a similar mandatory-reporting statute when holding that a child's statements to mandatory reporters were not testimonial. *See State v. Spencer*, 169 P.3d 384, 389 (Mont. 2007). There, the trial court introduced out-of-court statements about the defendant's sexual abuse that a child had previously made to a professional counselor and to her foster parent. *Id.* at 387. The defendant argued that these statements qualified as "testimonial" because Montana's mandatory-reporting statute required professional counselors and foster parents to report suspected abuse. *Id.* at 389. The Montana Supreme Court disagreed, finding "no indication that the Legislature intended to deputize this litany of professionals and individuals into law enforcement, and [refusing] to attach that significance to the duty to report." *Id.* Instead, the court held that "the objective circumstances indicate that when [the counselor] and [parent] heard [the child's] statements the primary purpose of their interactions with [the child] were counseling and parenting, respectively." *Id.* It thus found no Confrontation Clause violation in similar circumstances.

The California Supreme Court reached the same conclusion in *People v. Cage*, 155 P.3d 205 (Cal. 2007). In *Cage*, a 15-year-old child showed up at a hospital with a slash wound. In response to a doctor's question about "what happened," the child said that his mother had cut him. *Id.* at 207. The court found this statement non-testimonial even though

the doctor had a mandatory-reporting obligation under state law. *Id.* at 219-20. Specifically, it held that "[t]he mere fact that doctors must report abuse" neither "transform[s] them into *investigative agents* of law enforcement" nor "convert[s] their medically motivated questions during the examination of minor patients into investigatory interrogations that elicit testimonial responses." *Id.* at 220; *see also People v. Duhs*, 947 N.E.2d 617, 620 (N.Y. 2011) (noting that "it [was] of no moment that the pediatrician may have had a secondary motive for her inquiry, namely, to fulfill her ethical and legal duty, as a mandatory reporter of child abuse," because "[h]er first and paramount duty was to render medical assistance to an injured child"); *State v. Bella*, 220 P.3d 128, 132-33 (Or. Ct. App. 2009) (reaching similar result).

The Arkansas Supreme Court subsequently adopted similar reasoning in *Seely v. State*, 282 S.W.3d 778 (Ark. 2008). In that case, a child's mother, suspecting child sexual abuse by her father, took her to the hospital. *See id.* at 781. Before seeing a doctor, the child was interviewed by "a social worker whose duties included interviewing children who were brought in for physical or sexual abuse." *Id.* During the interview, the child stated that her father had abused her in response to the question whether "she knew why she was at the hospital." *Id.* The "court conclude[d] that this duty to report, by itself, did not render all statements made by [the child] to [the social worker] testimonial." *Id.* at 788. And even though the social worker knew "that the information she gathered might be used in a subsequent prosecution," *id.* at 789, the court nevertheless held that the statements were non-testimonial be-

cause the primary purpose of the conversation was to define the scope of any subsequent medical treatment and to ensure the child's safety, not to gather evidence for a prosecution, *id.* at 789-90.

Likewise, a Colorado Court of Appeals adopted the same analysis in a similar teaching setting. *See Phillips*, 315 P.3d at 165-66. In that case, a child (who eventually died of starvation) made various statements to school employees, including, for example, that his "dad clobbered" him in response to a question about his bruised right ear. *Id.* at 143. The trial court allowed the school employees to testify about the child's out-of-court statements, and the appellate court affirmed. *See id.* at 161-62, 165-66. The court reasoned that the "primary purpose" of the conversations with the school employees was "to assess [the child's] injury and determine whether human services should be notified," not to make a record for a subsequent criminal prosecution. *Id.* at 162. The court rejected the defendant's reliance on the mandatory-reporting statute, holding that the employees "were not law enforcement officials; law enforcement officials had not asked them to question [the child] about his injuries; and, they did not otherwise work with law enforcement officials to obtain [his] injury-related statements for later use in prosecuting defendant." *Id.* at 165-66.

In the federal courts, both the Fourth Circuit and U.S. Court of Appeals for the Armed Forces have reached similar conclusions. *See United States v. Squire*, 72 M.J. 285, 289 (C.A.A.F. 2013); *United States v. DeLeon*, 678 F.3d 317, 324 (4th Cir. 2012), *rev'd on other grounds by* 133 S. Ct. 2850 (2013). In

Squire, a mother took her eight-year-old daughter to the hospital after suspecting that the defendant had abused her. 72 M.J. at 287. When the doctor was taking the child's medical history, the child told him that the defendant had abused her. *Id.* On appeal, the defendant argued that the doctor qualified as "law enforcement" because he "was a mandatory reporter of cases involving child sexual assault victims under Hawaii state law." *Id.* at 288. The court rejected this argument "that this general requirement, which broadly covers health care professionals, employees of public and private schools, child care providers, and providers of recreational and sports activities, is alone sufficient to establish that [a doctor] was acting in a law enforcement capacity." *Id.* at 289. "Without more," the court continued, "we decline to 'deputize [the] litany of [mandatory reporters] into law enforcement.'" *Id.* (citation omitted).

Finally, in *DeLeon*, the Fourth Circuit reached a similar conclusion. There, a jury convicted the defendant of murdering his eight-year-old stepson. At trial, a social worker testified about prior statements that the stepson had made to her. The stepson's teacher had referred him to a social worker after noticing a bruise on his forehead. 678 F.3d at 320. He told the social worker about his stepfather's physical abuse. *Id.* at 320-21. The Fourth Circuit rejected the defendant's arguments that the social worker's testimony violated the Confrontation Clause, holding "that the primary purpose [of the conversation] was to develop a treatment plan—not to establish facts for a future criminal prosecution." *Id.* at 325-26. In the process, it rejected the defendant's reliance on

the fact that the social worker had "reporting requirements," noting that "[c]ourts have not treated such [a] factor[] as determinative when examining whether statements were provided for the purpose of future criminal prosecution." *Id.* at 324.

In short, the Ohio Supreme Court's decision below is irreconcilable with numerous decisions from other state and federal appellate courts. Whether its analysis is right or wrong, the conflict warrants this Court's attention.

III. THE OHIO SUPREME COURT'S DECISION RAISES AN IMPORTANT AND RECURRING ISSUE

The Court should also grant the petition for writ of certiorari because this case raises a recurring issue that implicates compelling state interests.

First, mandatory-reporting statutes like the one on which the Ohio Supreme Court relied here are ubiquitous. In fact, all 50 states and the District of Columbia have statutes that impose mandatory-reporting obligations similar to those imposed by the Ohio statute. *See* Ala. Code § 26-14-3; Alaska Stat. § 47.17.020; Ariz. Rev. Stat. § 13-3620; Ark. Code. Ann. § 12-18-402; Cal. Penal Code § 11165.9; Colo. Rev. Stat. § 19-3-304; Conn. Gen. Stat. § 17a-101; Del. Code Ann. tit. 16, § 903; D.C. Code Ann. § 4-1321.02; Fla. Stat. § 39.201; Ga. Code Ann. § 19-7-5; Haw. Rev. Stat. § 350-1.1; Idaho Code § 16-1605; 325 Ill. Comp. Stat. 5/4; Ind. Code. § 1-33-5-1; Iowa Code § 232.69; Kan. Stat. Ann. § 38-2223; Ky. Rev. Stat. Ann. § 620.030; La. Child Code Ann. art. 609; Me. Rev. Stat. Ann. tit. 22, § 4011-A; Md. Code Ann.,

Fam. Law § 5-704, 5-705; Mass. Ann. Laws ch. 119, § 51A; Mich. Comp. Laws § 722.623; Minn. Stat. § 626.556; Miss. Code Ann. § 43-21-353; Mo. Rev. Stat. § 210.115; Mont. Code Ann. § 41-3-201; Neb. Rev. Stat. § 28-711; Nev. Rev. Stat. § 432B.220; N.H. Rev. Stat. Ann. § 169-C:29; N.J. Stat. Ann. § 9:6-8.10; N.M. Stat. Ann. § 32A-4-3; N.Y. Soc. Serv. Law § 413; N.C. Gen. Stat. § 7B-301; N.D. Cent. Code § 50-25.1-03; Ohio Rev. Code § 2151.421; Okla. Stat. tit. 10A, § 1-2-101; Or. Rev. Stat. § 419B.010; 23 Pa. Cons. Stat. § 6311; R.I. Gen. Laws § 40-11-3; S.C. Code Ann. § 63-7-310; S.D. Codified Laws § 26-8A-3; Tenn. Code Ann. § 37-1-403; Tex. Fam. Code Ann. § 261.101; Utah Code Ann. § 62A-4a-403; Vt. Stat. Ann. tit. 33, § 4913; Va. Code Ann. § 63.2-1509; Wash. Rev. Code § 26.44.030(1)(a); W. Va. Code § 49-6A-2; Wis. Stat. § 48.981; Wyo. Stat. Ann. § 14-3-205.

Not only that, in at least 18 of these States, the obligation to report suspicions of child abuse is more expansive than in Ohio. In those States, *anyone* who suspects child abuse (not just a designated subset of individuals) must report suspicions of abuse to the appropriate authorities. *See* Pet. App. 38a n.4; *see also* Del. Code Ann. tit. 16, § 903; Fla. Stat. § 39.201(1)(a); Idaho Code § 16-1605(1); Ind. Code § 31-33-5-1; Ky. Rev. Stat. Ann. § 620.030(1); Md. Code Ann., Fam. Law § 5-705(a)(1); Miss. Code Ann. § 43-21-353(1); Neb. Rev. Stat. § 28-711(1); N.H. Rev. Stat. Ann. § 169-C:29; N.J. Stat. Ann. § 9:6-8.10; N.M. Stat. Ann. § 32A-4-3(A); N.C. Gen. Stat. § 7B-301(a); Okla. Stat. tit. 10A, § 1-2-101(B)(1); R.I. Gen. Laws § 40-11-3(a); Tenn. Code Ann. § 37-1-403(a)(1); Tex. Fam. Code Ann. § 261.101(a); Utah Code Ann. § 62A-4a-403(1)(a); Wyo. Stat. Ann. § 14-3-205(a).

There can be no dispute, therefore, that this case raises an issue that will affect literally every State in the Nation. Either the Ohio Supreme Court's reasoning is correct, in which case the conflicting state courts are systematically violating criminal defendants' Confrontation Clause rights. Or other state courts are correct, in which case, as the dissent put it, the Ohio Supreme Court has unnecessarily left "[c]hildren in Ohio unprotected." Pet. App. 47a.

Second, child abuse tragically remains all too common, and so criminal prosecutions for child abuse and neglect also remain all too common. Child abuse is a "pervasive and devastating force in our society." *Yates*, 808 N.E.2d at 864. Indeed, "'[b]y 1973 child abuse was recognized as the most common cause of death of small children in the United States.'" *Id.* (quoting 6 American Jurisprudence Proof of Facts 2d (1975), Failure to Report Suspected Case of Child Abuse, 345, 351). More recently, in 2012, an estimated 686,000 children were the victims of abuse or neglect. *See* Admin. for Children & Families, Dep't of Health & Human Servs., *Child Maltreatment 2012*, at xi (2013), *available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf; *cf. Paroline v. United States*, No. 12-8561, 2014 WL 1612426, at *4 (U.S. Apr. 23, 2014) (recognizing that "'sexual exploitation of children has grown exponentially'" with the Internet (citation omitted)). Accordingly, the issues presented by this case will continue to arise frequently.

Indeed, as the previously discussed conflict cases show, courts routinely have confronted the question whether statements become "testimonial" under the

Confrontation Clause when they are made to individuals who have been designated mandatory reporters. *See* Part II; *see also, e.g.*, Pet. App. 37a (noting that "several courts" have considered the question); *Phillips*, 315 P.3d at 165 (citing several "[c]ourts in other jurisdictions" to have considered the question). Given the frequency with which courts must grapple with the issue, it is "[o]bvious[] [that] judges, prosecutors, and defense lawyers have to know, in as definitive a form as possible, what the Constitution requires so that they can try their cases accordingly." *Williams*, 132 S. Ct. at 2248 (Breyer, J., concurring).

Third, this Court's guidance is also needed because of what can only be described as the compelling state interests at stake. It should go without saying that the States have a significant interest in identifying and preventing child abuse and neglect. The prevalence of mandatory-reporting statutes reflect that significant state interest. *See Lindsay v. Dep't of Social Servs.*, 791 N.E.2d 866, 871 (Mass. 2003) ("The purpose of [the mandatory reporting statute] is to alert the department to instances where children may have been abused or neglected and, if the department's investigation confirms those reported suspicions, to take steps to protect the child and correct the underlying situation that led to the abuse or neglect."); *Jensen v. Anderson Cnty. Dep't of Social Servs.*, 403 S.E.2d 615, 619 (S.C. 1991) ("[T]he purpose of the child abuse statutes is to provide protection for children from being abused."). Such state interests are particularly significant because in many cases "children lack the ability to ameliorate their own plight." *Yates*, 808 N.E.2d at 867; *see also*

United States v. Peneaux, 432 F.3d 882, 894 (8th Cir. 2005) ("[I]dentification of the abuser is a matter of great concern because if the person who brought the child to the [health] clinic is the abuser, the child should not leave with that individual.").

In sum, the Court should grant the petition for a writ of certiorari in light of the States' compelling interest in protecting children from abuse and the recurring nature of the questions presented.

IV. THIS CASE PROVIDES A GOOD VEHICLE TO CONSIDER THE IMPORTANT QUESTIONS THAT IT PRESENTS

The Court should lastly grant the petition for writ of certiorari because this case provides a good vehicle to consider the questions presented. To begin with, the Ohio Supreme Court's decision rested *entirely* on the federal Confrontation Clause, as illustrated by its heavy reliance on this Court's cases. *See, e.g.*, Pet. App. 17a ("The passionate rant of the dissent and its parade of horribles to the contrary, today's majority decision supports a basic constitutional right guaranteed to all accused of crime by the *Sixth Amendment of the United States Constitution* (emphasis added)); *see also* Pet. App. 18a (noting that the majority was "wrong as a matter of *federal* constitutional law" (emphasis added)). As a result, the Court need not worry about its jurisdiction to consider the questions presented because the Ohio Supreme Court did not discuss or rely on any state-law issues. *See Ohio v. Robinette*, 519 U.S. 33, 36-37 (1996). That explains why the dissent expressed its "hope that four justices vote to accept [the dissent's]

invitation" to consider the issues presented by this case. Pet. App. 47a.

In addition, this is not a case in which the teachers that spoke with the child did so either at law enforcement's request or in cooperation with law enforcement. To the contrary, as the dissent noted, "there [was] no police involvement in the interview" between the teachers and L.P. Pet. App. 37a. Accordingly, the Court need not consider when private actors should be viewed as "agents of law enforcement" because of their extensive cooperation with the police when engaging in the relevant interview. *See, e.g.*, *Bobadilla v. Carlson*, 575 F.3d 785, 791-92 (8th Cir. 2009) (noting that "instead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the same"). The lack of any police participation presents the questions in the best procedural posture. The Court can focus solely on those questions—whether the mandatory-reporting statute made the teachers agents of law enforcement and, if not, whether statements to them should nevertheless be considered testimonial—without having to consider how police involvement might affect the analysis.

Relatedly, there is no evidence in this case that the child's statements at issue were made "in order to evade confrontation." *Davis*, 547 U.S. at 840 (Thomas, J. concurring). Like the absence of police participation, the absence of evidence suggesting an attempt to evade the requirements of the Confrontation Clause allows the Court to focus narrowly on the questions of what effect a mandatory-reporting obligation has under the Sixth Amendment and of how

statements to non-law enforcement should be treated under that amendment. The Court need not consider whether, even in the absence of law enforcement involvement, there was an attempt to evade formalized process and confrontation.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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APPENDIX

RECORD AND BRIEFS

13-1352

No. 13-____

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

APPENDIX

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APPENDIX A

137 Ohio St.3d 346
Supreme Court of Ohio.

THE STATE OF OHIO, Appellant,

v.

CLARK, Appellee.

No. 2012–0215
Submitted: January 23, 2013
Decided: October 30, 2013

Appeal from the Court of Appeals for Cuyahoga County, No. 96207, 2011-Ohio-6623.

Criminal law—Confrontation Clause—R.C. 2151.421—A teacher acts in a dual capacity as an instructor and as an agent of the state for law-enforcement purposes when questioning a child about suspected abuse in furtherance of the teacher's duty to report abuse—Statements elicited from a child by a teacher in the absence of an ongoing emergency and for the primary purpose of gathering information of past criminal conduct and identifying the alleged perpetrator of suspected child abuse are testimonial.

SYLLABUS OF THE COURT

1. At a minimum, when questioning a child about suspected abuse in furtherance of a duty pursuant to R.C. 2151.421, a teacher acts in a dual capacity as both an instructor and as an agent of the state for law-enforcement purposes.

2. Statements elicited from a child by a teacher in the absence of an ongoing emergency and for the primary purpose of gathering information of past criminal conduct and identifying the alleged perpetrator of suspected child abuse are testimonial in nature in accordance with *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), and *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534.

O'DONNELL, J.

{¶ 1} The issue in this case is whether the trial court violated Darius Clark's constitutional right to confront the witnesses against him when it admitted a hearsay statement that three-and-a-half-year-old L.P. made to his preschool teacher, Debra Jones, in response to questions asked about injuries to his eye and marks on his face observed upon his arrival at a preschool day care.

{¶ 2} In *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the court enunciated the primary-purpose test to determine whether a statement made to a law-enforcement officer or an agent of law enforcement in the course of an investigation is testimonial or nontestimonial.

{¶ 3} We adopted that test in *State v. Siler*, holding: "'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing

emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.'" 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, paragraph one of the syllabus, quoting *Davis* at 822.

{¶ 4} At the time Jones questioned L.P., she acted as an agent of the state for purposes of law enforcement because at a minimum, teachers act in at least a dual capacity, fulfilling their obligations both as instructors and also as state agents to report suspected child abuse pursuant to R.C. 2151.421, which exposes them to liability if they fail to fulfill this mandatory duty. Because the circumstances objectively indicate that no ongoing emergency existed and that the primary purpose of the questioning was to establish or prove past events potentially relevant to a later prosecution, the statement L.P made to his preschool teacher is testimonial in nature, and its admission into evidence violated Clark's right to confront witnesses under the Sixth Amendment to the United States Constitution.

{¶ 5} Accordingly, we affirm the judgment of the court of appeals.

Factual and Procedural History

{¶ 6} Darius Clark lived with his girlfriend, T.T., her three-year-old son, L.P., and her two-year-old daughter, A.T. On March 17, 2010, Clark dropped off L.P. at the William Patrick Day Head Start Center in Cleveland. While in the center's lunchroom, one of L.P.'s preschool teachers, Ramona Whitley, observed that L.P.'s left eye appeared bloodshot and bloodstained. She asked him, "What

happened?" and L.P. at first said nothing but then replied, "I fell." Whitley asked, "How did you fall and hurt your face?" and L.P answered, "I fell down."

{¶ 7} On arriving in the brighter light of the classroom, Whitley looked again at L.P and saw "[r]ed marks, like whips of some sort" on L.P.'s face. Whitley, "in shock," got the attention of the class's lead teacher, Debra Jones.

{¶ 8} When Jones saw L.P.'s eye, she said, "He needs to go to Ms. Cooper, my supervisor. After I looked at him, I said, you know, I'm going to take him to Ms. Cooper." Jones then asked, "Who did this? What happened to you?" L.P. "seemed kind of bewildered. He said something like Dee, Dee." Jones described L.P. as "Out. Staring out. And I was asking him—he almost looked uncertain, but he said, Dee." Because L.P. had only attended the school for a short time, Jones could not be certain that the child understood her questions. Jones escorted L.P to the school office. She testified that when the supervisor, Cooper, observed L.P.'s injuries, she said, "Whoever seen [sic] him first got to make the call." As a result, Whitley called 696-KIDS and made a report of suspected child abuse.

{¶ 9} In response, the Cuyahoga County Department of Child and Family Services ("CCDCFS") sent a social worker to the school to question L.P. Clark arrived at the school while the social worker was questioning L.P and denied responsibility for L.P.'s injuries. Clark then left with the child.

{¶ 10} The next day, a social worker located T.T.'s children at the home of Clark's mother and took

them to the hospital. A physician determined that L.P. had bruising in various stages of development and abrasions consistent with having been struck by a linear object and that A.T. had bruising, burn marks, a swollen hand, and a pattern of sores at her hairline. The physician suspected child abuse and estimated that the injuries occurred between February 28 and March 18, 2010.

{¶ 11} A grand jury indicted Clark on one count of felonious assault relating to L.P., four counts of felonious assault relating to A.T., two counts of endangering children, and two counts of domestic violence. The trial court declared L.P incompetent to testify but denied Clark's motion in limine to exclude L.P.'s out-of-court identification statements. Seven witnesses testified regarding the statements made by L.P.: Jody Remington, a Cleveland police detective; Sarah Bolog, a CCDCFS social worker; Howard Little, a CCDCFS intake social worker; Whitley and Jones; the children's maternal grandmother; and the children's maternal great-aunt. Unexplained in this record, and highlighted by the court of appeals in its opinion, is that the trial court declared L.P incompetent to testify at the time of trial, yet it permitted testimony about statements this incompetent three-and-a-half-year-old child made to his teachers six months earlier. The jury found Clark guilty of all charges, except for one count relating to A.T., and the court thereafter sentenced Clark to an aggregate 28-year prison term.

{¶ 12} Clark appealed, claiming that the trial court violated his right to confrontation by allowing witnesses to testify about the statements L.P. made to his preschool teachers. The court of appeals held

that the trial court abused its discretion when it permitted Detective Remington, Bolog and Little (the social workers), and Whitley and Jones (the preschool teachers) to testify regarding L.P.'s statements, because they were testimonial and their admission violated the Confrontation Clause. *State v. Clark*, 8th Dist. Cuyahoga No. 96207, 2011-Ohio-6623, 2011 WL 6780456, at ¶ 19, 26, 31, and 35. The appellate court reversed Clark's convictions and remanded the matter for a new trial. *Id.* at ¶ 72. We accepted the state's appeal challenging only the exclusion of testimony from Whitley and Jones and asserting that it did not violate the Confrontation Clause; the state did not appeal the decision of the appellate court that testimony from Detective Remington and from social workers Bolog and Little violated the Confrontation Clause and was therefore inadmissible.

Law and Analysis

Teachers as Agents of Law Enforcement

{¶ 13} Ohio law imposes a duty on all school officers and employees, including administrators and employees of child day-care centers, to report actual or suspected child abuse or neglect. R.C. 2151.421, the source of that duty, provides:

> (A)(1)(a) No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age * * * has suffered or faces a threat of suffering any physical or

> mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, the person making the report shall make it to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. * * *
>
> (b) Division (A)(1)(a) of this section applies to any person who is an * * * administrator or employee of a child day-care center; * * * administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority * * *.

{¶ 14} In *Yates v. Mansfield Bd. of Edn.*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 861, ¶ 30, we noted that R.C. 2151.421 imposes mandatory reporting duties on teachers and others listed in the statute because they are among the "most likely and qualified persons to encounter and identify abused and neglected children" and have "the necessary training or skill to detect the symptoms of child abuse." As the court further explained:

> [w]hile * * * the primary purpose of reporting is to facilitate the protection of abused and neglected children rather than to punish those who maltreat them, *it is clear that the General Assembly considered identification and/or prosecution of the*

> *perpetrator to be a necessary and appropriate adjunct in providing such protection*, especially in the institutional setting. Thus, R.C. 2151.421(F)(1) and (2) provide that children services agencies shall investigate each report of known or suspected child abuse in cooperation with law enforcement to determine, among other things, "the cause of the injuries * * * and the person or persons responsible" and "make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect *any children* that are brought to its attention."

(Emphasis added in part.) *Id.* at ¶ 25.

{¶ 15} Thus, prosecution for criminal acts of child abuse is expressly contemplated by the reporting statute as a means of protecting children. And in order to effectuate that purpose, R.C. 2151.421(C) requires the person reporting the abuse to provide a written report if one is requested by the receiving agency. Further, a failure to report suspected child abuse is a criminal offense pursuant to R.C. 2151.99(C), and R.C. 2151.421(M) makes a mandated reporter "liable for compensatory and exemplary damages to the child who would have been the subject of the report that was not made."

{¶ 16} Although a teacher's questioning of a child about suspected injury is consistent with a duty to report potential abuse and arises from a concern to protect a child, the United States Supreme Court's Confrontation Clause analysis requires that we ascertain the "primary purpose" for the questioning. Here, the circumstances objectively indicate that the

primary purpose of the questions asked of L.P. was not to deal with an existing emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution. His teachers reacted to manifest signs of child abuse and complied with their statutory and professional duties to report it to child-protection authorities. They did not seem to believe his story that he had fallen and instead focused on who caused the injuries. Notably, Jones's first question on seeing L.P. was "Who did this?" And his teachers did not treat the situation as involving any ongoing medical emergency. L.P. did not complain of his injuries, he did not have any need for urgent medical care, and his teachers did not render any medical treatment. Immediately after L.P responded, Whitley called 696-KIDS and made a report, and shortly thereafter, a social worker, Little, arrived at the school to further investigate the allegation of abuse; within two days, both teachers gave formal statements to police.

{¶ 17} The purpose of a teacher's duty to report suspicions of child abuse is to protect children, and information reported to teachers can be used by child-protection agencies to separate the child from a dangerous situation as the investigation unfolds. It can lead to counseling for the family or even the permanent removal of the child from the parents' custody. Here, the information also led to criminal prosecution, and therefore the use of the child's statements implicates the defendant's constitutional rights. When teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator, any statements obtained are testimonial for purposes of the Confrontation Clause.

Admission of Out-of-Court Statements

{¶ 18} The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *."

{¶ 19} In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the court recognized that the interpretation of the Sixth Amendment articulated in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), could not be reconciled with the historical underpinnings of the Confrontation Clause. It held that the Sixth Amendment "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford* at 61. Because the Sixth Amendment guarantees the accused's right to confront those who "bear testimony," *id.* at 51, the Confrontation Clause bars admission of testimonial statements unless the witness appears at trial or, if the witness is unavailable, the accused had a prior opportunity for cross-examination. *Id.* at 59. The court explained that "[w]hatever else the term ['testimonial'] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68.

{¶ 20} Two years later, the court revisited the issue in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Both cases involved statements by domestic-violence victims who did not testify at trial: in *Davis*, the victim made statements to a 9-1-1 operator identifying her

assailant and describing his whereabouts immediately after an assault, whereas in *Hammon*, the victim made statements to police officers responding to a domestic-violence complaint after they had secured the scene. In those cases, the court distinguished police interrogations that relate to an ongoing emergency from those that relate to past criminal conduct. In considering whether the statements made in the context of those two different situations were testimonial, the court formulated the primary-purpose test: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822.

{¶ 21} Applying the primary-purpose test in *Davis*, the court determined that the objective circumstances surrounding the victim's interrogation indicated that "its primary purpose was to enable police assistance to meet an ongoing emergency." *Id.* at 828. The court reasoned that "the nature of what was asked and answered [during the 9-1-1 call], again, viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn * * * what had happened in the past." (Emphasis sic.) *Id.* at 827. In addition, the victim's call "was plainly a call for help against bona fide physical threat" and involved "frantic answers" given "in an environment

that was not tranquil, or even * * * safe." *Id.* Accordingly, the court held that the statements were nontestimonial, and therefore were admissible. *Id.* at 828.

{¶ 22} Application of the primary-purpose test in *Hammon* produced a contrary result: the court concluded that the statements were testimonial and were barred by the Sixth Amendment. *Id.* at 830. The court stated that there was "no immediate threat" to the victim and "no emergency in progress" because the police had separated the abusive husband from the wife, *id.* at 829-830, and it reasoned that when the officer questioned the victim, he was "not seeking to determine (as in *Davis*) 'what is happening' but rather 'what happened.'" *Id.* at 830. The court concluded that "[objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." *Id.*

{¶ 23} Ohio adopted the primary-purpose test in *State v. Siler* and, relying on *Davis*, held that the primary-purpose test applies to a child declarant's statements made to police or to those the court determines to be police agents. In that case, we concluded that a child's statement to a detective, after the crime scene had been secured, was testimonial and not admissible under the Sixth Amendment.

{¶ 24} The United States Supreme Court recently clarified the primary-purpose test in *Michigan v. Bryant*, __ U.S. __ , 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011), providing further explanation of the "ongoing emergency" discussed in *Davis*. In *Bryant*, police officers responded to a call about a shooting and

found the victim, Anthony Covington, lying on the ground with a gunshot wound. The officers asked Covington, "'what had happened, who had shot him, and where the shooting had occurred.'" *Id.* at 1150. Covington told the police that he and the defendant, Richard Bryant, had had a conversation through the back door of the defendant's house. Covington explained that when he turned to leave, he was shot through the door but then drove to the gas station where the police found him; he died within hours. At trial, the police officers who spoke with Covington testified about what he had said.

{¶ 25} Determining that the primary purpose of the statements was to enable the police to deal with an ongoing emergency, the court held that Covington's statements identifying the shooter as "Rick" and the location of the shooting were nontestimonial statements. *Id.* at 1166-1167. The court emphasized that determining whether the purpose of the interrogation is to deal with an ongoing emergency or to establish past events for later criminal prosecution is a factor in the analysis. *Id.* at 1160. The crux of the analysis of the circumstances of the encounter between the declarant and the police does not involve the subjective or actual purpose of the participants in the encounter but "the purpose that reasonable participants would have had" as determined from the participant's statements and actions and the circumstances involved. *Id.* at 1156. The focus must be on the perspective of the parties at the time of the interrogation and not in hindsight. "If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was

later proved incorrect, that is sufficient for purposes of the Confrontation Clause." *Id.* at 1157, fn. 8.

{¶ 26} The court explained that "whether an emergency exists and is ongoing is a highly context-dependent inquiry." *Id.* at 1158. It noted that the zone of potential victims is more narrow in domestic-violence cases than in cases of public threat and that the neutralization of harm to the first victim does not end the assessment of whether an emergency is ongoing, because there may be a continuing threat to first responders or the public at large. *Id.*

{¶ 27} In addition, the court reiterated its earlier observation that "'a conversation which begins as an interrogation to determine the need for emergency assistance' " can "'evolve into testimonial statements.'" *Id.* at 1159, quoting *Davis*, 547 U.S. at 828, 126 S.Ct. 226, 165 L.Ed.2d 224. This evolution occurs, for example, when "a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute" or when "a perpetrator is disarmed, surrenders, is apprehended, or, as in Davis, flees with little prospect of posing a threat to the public." *Id.*

{¶ 28} Although the existence of an ongoing emergency is important, the court stressed that it is but one factor to be considered when determining the primary purpose of an interrogation. *Id.* The informality of the encounter might also be assessed, because "formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to 'establish or prove past events potentially relevant to later

criminal prosecution.'" *Id.*, quoting *Davis* at 822. Because the police had encountered a "fluid and somewhat confused" situation, *id.* at 1166, the court in *Bryant* concluded that the questioning by police lacked formality because it "occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion." *Id.* at 1160.

{¶ 29} "In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation." *Id.* The court further stated that objectively determining the primary purpose of the interrogation, by examining the statements and actions of the participants, was the approach most consistent with its past holdings. *Id.* at 1162.

{¶ 30} Applying the primary-purpose test to L.P.'s statement compels the conclusion that it was testimonial; no ongoing emergency existed, nor had L.P. complained about his injuries or needed emergency medical care. Rather, his teachers acted to fulfill their duties to report abuse. In fact, Whitley testified that "when the children come in, we're supposed to always observe them, look for different things, what's going on with them." At a minimum, when questioning a child about suspected abuse in furtherance of a duty pursuant to R.C. 2151.421, a teacher acts in a dual capacity as both an instructor and as an agent of the state for law-enforcement purposes.

{¶ 31} Here, the nature and focus of the questions asked indicate a purpose to ascertain facts of potential criminal activity and identify the person or persons responsible. Thus, because the teachers

acted as agents of the state for law-enforcement purposes, the appropriate test to be applied is the primary-purpose test. *Bryant* directs that the statements and actions of an interrogator as well as a declarant must be examined to determine the primary purpose of the declarant's statements.

{¶ 32} The record reveals that no emergency existed either at the time Whitley observed L.P. or when Jones questioned him. His teachers were "shocked" by his injuries and immediately suspected child abuse; they separated L.P. from other students and in a formal question-and-answer format, they sought facts concerning past criminal activity to identify the person responsible, eliciting statements that "are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-311, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), quoting Davis, 547 U.S. at 830, 126 S.Ct. 2266, 165 L.Ed.2d 224.

{¶ 33} Thus, the primary purpose of that inquiry was not to extricate the child from an emergency situation or to obtain urgently needed medical attention, but rather was an information-seeking process to determine what had occurred in the past and who had perpetrated the abuse, establishing past events potentially relevant to later criminal prosecution. L.P.'s statements identifying Clark as responsible for his injuries are therefore testimonial and should have been excluded from evidence pursuant to the Confrontation Clause.

Conclusion

{¶ 34} For these reasons, the admission of L.P.'s statements violated Clark's right to confrontation, and the judgment of the court of appeals is affirmed.

{¶ 35} The passionate rant of the dissent and its parade of horribles to the contrary, today's majority decision supports a basic constitutional right guaranteed to all accused of crime by the Sixth Amendment of the United States Constitution: "the right * * * to be confronted with the witnesses against him." In this case, a three-year-old allegedly uttered a statement identifying Clark but never testified in court because the judge determined him to be incompetent to testify at trial six months after he had uttered the identification.

{¶ 36} Statements elicited from a child by a teacher in the absence of an ongoing emergency and for the primary purpose of gathering information of past criminal conduct and identifying the alleged perpetrator of suspected child abuse are testimonial in nature in accordance with *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), and *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534.

Judgment affirmed.

PFEIFER, KENNEDY, and O'NEILL, JJ., concur.

O'CONNOR, C.J., and LANZINGER and FRENCH, JJ., dissent.

O'CONNOR, C.J., dissenting.

{¶ 37} The majority decision creates confusion in our case law, eviscerates Evid.R. 807, and threatens the safety of our children. Not surprisingly, it is also wrong as a matter of federal constitutional law. I dissent.

{¶ 38} A teacher is not an agent of law enforcement for the purpose of determining whether a statement is testimonial under the Confrontation Clause merely because that teacher has a statutory duty to report child abuse. On the record before us, there is no basis from which to conclude that the injured child's teachers acted on behalf of law enforcement. Therefore, there is no support in the law or on these facts for the conclusion that the statements made to the teachers by L.P., the injured child, or similar statements made to teachers in any Ohio schoolroom, should be scrutinized under a test that is otherwise applicable only when the interviewer is an agent of law enforcement. See *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

{¶ 39} Instead, statements to teachers should be scrutinized under the objective-witness test, which is applicable when the questioner is not an agent of law enforcement. In this appeal, the teachers questioned L.P. about his injuries to protect L.P and possibly other students from additional injury, and to maintain a secure and orderly classroom in which learning could take place. No objective witness could reasonably believe that the interviews served a prosecutorial purpose rather than a protective one. Thus, under the law of this court and the United States Supreme Court, I would hold that the

classroom statements made by this small child, L.P., to his teachers are nontestimonial and thus are not excluded by the Confrontation Clause.

RELEVANT FACTS

{¶ 40} Appellee, Darius Clark, and his girlfriend, "T.T.,"[1] were indicted on multiple counts of felonious assault, child endangerment, and domestic violence stemming from Clark's physical abuse of T.T.'s son, L.P., who was three and one-half years old, and her daughter, A.T., who was nearly two years old.

{¶ 41} Before trial, the trial court ruled that L.P. was not competent to testify at trial, and Clark moved to exclude testimony regarding any out-of-court statements made by L.P. about the abuse. Clark argued that the introduction of those statements would violate his constitutional right to confront a witness against him. The trial court denied the motion.

{¶ 42} At trial, T.T. testified that she started dating Clark in early 2008 and that the two began living together soon thereafter. By May 2009, Clark had become her pimp, and T.T. regularly took the Greyhound bus from Cleveland to Washington, D.C., to engage in prostitution. At first, T.T.'s family watched her two children while she was in Washington, D.C. But eventually, she began leaving

---

[1] T.T. is an adult. But because she has the same last name as her child, A.T., who was one of the victims, I use T.T.'s initials in order to protect A.T.'s identity. T.T. pled guilty to child endangerment, domestic violence, and permitting child abuse and agreed to testify against Clark. She was sentenced to eight years' imprisonment.

L.P. and A.T. with Clark. And she continued to do so even after she realized that Clark was physically abusing the children. T.T. testified that around midnight, March 16, 2010, she left for Washington, D.C., to engage in prostitution. She left L.P. and A.T., unharmed, in Clark's care.

{¶ 43} The next day, March 17, 2010, at approximately 1:00 p.m., Clark dropped L.P off at his school, William Patrick Day School, which was operated by the Council for Economic Opportunities of Greater Cleveland Head Start. Ramona Whitley, one of L.P.'s teachers, saw L.P. in the lunchroom and noticed that his eye was bloodshot or bloodstained. She asked him, "What happened?" He told her that he had fallen. Whitley then asked, "How did you fall and hurt your face?" L.P. again said that he had fallen. Whitley noted that L.P. was not as talkative as usual and wouldn't eat.

{¶ 44} When L.P. went into the classroom, he played at a table. In the brighter light of the classroom, Whitley noticed additional injuries. She saw red marks on L.P.'s head "like whips of some sort" and welts on his face. Whitley testified that she was "kind of like in shock" and asked, "Oh, what happened?"

{¶ 45} Whitley then got the attention of the lead teacher, Debra Jones, and asked her to look at L.P. At this time, Jones saw L.P.'s bloodshot or bloodstained eye and some "redness" around his neck. Jones immediately said, "Whoa, what happened?" and "Who did this? What happened to you?" Jones testified that L.P seemed "kind of bewildered" but then said something like "Dee, Dee." Jones, wanting to know if L.P. was talking about

another child, asked, "Is he big or little?" Jones testified that L.P. said, "Dee is big."

{¶ 46} Because Jones did not want to embarrass L.P. or alarm any of the children, she took L.P to the office of her supervisor, Ms. Cooper. Jones testified that Cooper asked L.P if she could see his shirt. When Cooper raised L.P.'s shirt, Jones saw red marks on L.P.'s body. It was only at this point—after the child was taken to the supervisor's office—that the decision was made to report a suspicion that L.P. had been abused. Because Whitley had first observed L.P.'s injuries, Cooper directed her to call the child-abuse-reporting hotline. Whitley did so.

{¶ 47} The county children's services agency investigated Whitley's report. Howard Little, a social worker with the county children's services agency, went to the school. He saw L.P.'s injuries and talked with the child. When Clark arrived at the school, Little began to question him. Clark grabbed L.P. and walked out, even though Little tried to stop him. Clark got into a car that was parked in front of the school and drove off. Little was unable to get the license plate.

{¶ 48} The agency was unable to find L.P. until the next day, when another social worker, Sarah Bolog, and her supervisor tracked him and his sister, A.T., down at the home of Clark's mother. Bolog testified that she confirmed L.P.'s injuries and she discovered very serious injuries on A.T., including two black eyes and a large burn on her cheek. Bolog called 9-1-1. Both children were taken to the hospital after the police arrived.

{¶ 49} A jury convicted Clark of all but one count set forth in the indictment. He was sentenced to an aggregate term of imprisonment of 28 years. In reversing the conviction, the Eighth District Court of Appeals concluded that the primary purpose of the teachers' questioning was to report potential child abuse to law enforcement and thus that L.P.'s answers were testimonial. 2011-Ohio-6623 at ¶ 35. I would reverse that holding.

ANALYSIS

A

The right to confrontation generally

{¶ 50} The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." But "not all hearsay implicates the Sixth Amendment's core concerns." *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Admission of an out-of-court statement of a witness who does not appear at trial is prohibited by the Confrontation Clause if the statement is testimonial unless the witness is unavailable and the defendant had had a prior opportunity to cross-examine the witness. *Id.* at 53-54.

{¶ 51} *Crawford* did not define "testimonial" but stated generally that the core class of statements implicated by the Confrontation Clause includes statements "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* at 52, quoting Brief of Amicus Curiae National Association of Criminal Defense Lawyers 3.

The court expressly linked testimonial statements to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68.

{¶ 52} But the *Crawford* court declined to specifically decide which police interrogations are implicated by the Confrontation Clause because it recognized that the statement at issue in that case, a recorded statement knowingly given by a witness in custody and in response to structured police questioning, qualified as a police interrogation "under any conceivable definition." *Id.* at 53, fn. 4.

United States Supreme Court cases explaining "testimonial" in the context of police interrogations

{¶ 53} Two years after Crawford, the court addressed the term "testimonial" in the context of police interrogations. *Davis*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224. The court held that statements made in the course of police interrogations are "testimonial when the circumstances objectively indicate that there is no * * * ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822. In doing so, it made clear that not all statements made to police officers are testimonial. *Id.*

{¶ 54} Moreover, Davis did not hold that only those statements made to police officers in response to an immediate danger are nontestimonial. *Id.*; *see State v. Krasky*, 736 N.W.2d 636 (Minn.2007). Rather, "the precise question was whether

emergency calls to police are treated differently than statements made in the regular course of a police interrogation." *Krasky* at 643, quoting *Davis* at 822. As the *Davis* court explained, it was not "attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial." *Davis* at 822.

{¶ 55} The United States Supreme Court recently clarified the *Davis* police-interrogation test. *Michigan v. Bryant*, ___U.S.___, 131 S.Ct. 1143, 1156, 179 L.Ed.2d 93 (2011). In doing so, it explained that the *Davis* police-interrogation test recognizes that "[p]olice officers in our society function as both first responders and criminal investigators." *Id.* at 1161.

{¶ 56} In both *Crawford* and *Bryant*, police questioning elicited the statements admitted at trial, and in *Davis*, a 9-1-1 operator elicited the statements. The court in *Davis* assumed (but did not decide) that 9-1-1 operators are agents of the police when they conduct interrogations of 9-1-1 callers. *Davis*, 547 U.S. at 823, 126 S.Ct. 2266, 165 L.Ed.2d 224, fn. 2. And it explained that it had the luxury of indecision on this point because it determined that the statements to the 9-1-1 operator were nontestimonial, even if the operator was an agent of law enforcement. *Id.* That tack made it "unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Id.* Notably, both the majority and a dissent in *Bryant* acknowledged the question left open by *Davis* and both stated that *Bryant* also left the question open

because the statements in *Bryant* were also elicited by police officers. *Bryant* at 1155, fn. 3. Thus, contrary to the majority's suggestion that *Davis* compels the conclusion that L.P.'s statements to his teachers were testimonial, the United States Supreme Court has yet to decide under what circumstances statements are testimonial when they are made to someone other than law-enforcement personnel.

{¶ 57} But as is instructive here, the court has repeatedly held that courts must identify the primary purpose of an out-of-court statement by applying an objective test. *Williams v. Illinois*, ___ U.S. ___, 132 S.Ct. 2221, 2243, 183 L.Ed.2d 89 (2012), citing *Bryant* at 1156.

Ohio Supreme Court cases explaining "testimonial" in the context of questioning by persons other than law-enforcement officers

{¶ 58} In our decision in *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, rendered the same year that the United States Supreme Court decided *Davis*, we applied *Crawford* and answered the question identified but not answered by *Davis*.

{¶ 59} We held that statements made in response to questions by a medical professional in a unit specializing in the care of sexual-assault victims were made primarily for a medical purpose, and were nontestimonial, despite the unit's purpose to assist law enforcement. *Stahl* at ¶ 39, 46; *see also State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, ¶ 28 (discussing the reasoning of *Stahl*). We stated that the case did not involve a police interrogation, even though a police officer remained

in the room while the medical professional interviewed the victim. *Id.* at ¶ 18. We also adopted the objective-witness test, which provides that statements made to someone other than law-enforcement personnel are testimonial only when an objective witness would reasonably believe that the questioning served primarily a prosecutorial purpose. *Stahl* at ¶ 36.

{¶ 60} In *Stahl*, a woman appeared at a police station and reported that she had been raped by her boyfriend's former boss, James Stahl. After taking a detailed report, a police officer transported the woman to a Developing Options for Violent Emergencies ("DOVE") unit at the local hospital, where she signed a consent form agreeing to release any evidence, information, clothing, and photographs for prosecution of the case. A nurse practitioner asked about her medical history and the alleged assault and performed a physical examination, during which physical evidence, including DNA, was collected and preserved. Five weeks later, the woman died from an unrelated disorder, without having given any formal testimony.

{¶ 61} The state charged Stahl with one count of rape and one count of kidnapping. In the trial court, the victim's statements to the nurse practitioner were suppressed. In an interlocutory appeal, the Ninth District Court of Appeals reversed after concluding that the statements were nontestimonial. We affirmed. *Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, ¶ 48.

{¶ 62} We acknowledged that the DOVE unit "partly serve[d] a prosecutorial function by collecting evidence." *Id.* at ¶ 39. But we concluded that the

prosecutorial function was at best secondary to the unit's primary purpose of patient care. *Id.*

{¶ 63} We rejected Stahl's claims that the DOVE unit's mission statement, which expressly embraced the unit's role in assisting law enforcement, or its economic support from the attorney general's office, compelled the conclusion that the alleged victim's statements to the nurse practitioner were testimonial. *Id.* at ¶ 40-41. We applied the objective-witness test and explained that "[n]othing in the record establishes that a reasonable witness in the [victim's] position would believe that the DOVE unit serves primarily a prosecutorial function." *Id.* at ¶ 40. We emphasized that there was no reason to believe that the patient would have been aware of the unit's stated mission or its funding source. *Id.* at ¶ 40-41.

{¶ 64} We similarly rejected Stahl's argument that the language of a consent form, which stated that evidence gleaned from the medical examination would be used in the prosecution, demonstrated that "a reasonable person in the [victim's] position would have expected the police to use her statement in the prosecution of a crime." *Id.*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, at ¶ 45. We noted that the consent form referred only to the physical evidence that was collected, not to any statements that were elicited. *Id.* at ¶ 47. We explained that the victim could have reasonably assumed that identifying the person who had attacked her to a medical professional would serve a medical purpose, i.e., to determine whether she had been exposed to and therefore required treatment for any sexually

transmitted diseases and to structure a plan for her safe release. *Id.* at ¶ 46.

{¶ 65} We found that Stahl's argument that the nurse practitioner was an agent of law enforcement merely because she had consulted with the police about whether a rape-evidence-collection kit would be useful was flawed. We emphasized that in determining whether the victim's statements are testimonial, "courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations." *Id.* at paragraph two of the syllabus. Because there was no evidence that the victim knew of the nurse practitioner's discussion with the officer about the rape-evidence-collection kit, the discussion "could not be relevant in determining [the victim's] reasonable expectations in submitting to the examination." *Id.* at ¶ 42.

{¶ 66} *Stahl* addressed the applicability of the objective-witness test when the police had escorted the victim to the DOVE unit for examination and the nurse there had consulted a police officer before collecting and preserving evidence. Stahl contrasts starkly with the case before us, in which L.P. was questioned by his teachers long before law enforcement was contacted.

{¶ 67} We next applied the objective-witness test in *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944. In *Muttart*, a woman contacted the police station and reported that her friend's four-and-one-half-year-old daughter, A.M., had described being sexually assaulted by her father, Dennis Muttart. After the police investigated, the

mother took A.M. to a physician. That physician referred A.M.'s mother to the Child Maltreatment Clinic at a hospital in Toledo to be seen by a specialist in the treatment of children who have been sexually abused. A social and medical history was collected from A.M. During this interview, A.M. described in detail how Muttart had sexually abused her. Based on the child's statements, a doctor recommended that she be "afforded complete protection from the alleged perpetrator" and that both she and her mother undergo counseling. *Id.* at ¶ 17.

{¶ 68} A.M.'s mother took the child for counseling. A clinical counselor interviewed A.M. Although A.M. did not tell the counselor that she had been abused, A.M. did tell the counselor that she did not want to see Muttart. A.M. later told another counselor in detail how Muttart had sexually abused her.

{¶ 69} We concluded that the admission of A.M.'s out-of-court statements to the medical professionals did not offend the Confrontation Clause. *Id.* at ¶ 61. We applied the objective-witness test because the statements were not elicited as part of a police investigation or in a sworn statement to preserve them for trial, and they were not fostered by the state but were made for a purpose other than law enforcement, i.e., for medical diagnosis and treatment. *Id.* The later use of the statements at trial by the state did not "change the fact that the statements were not made for the state's use." *Id.* at ¶ 62.

{¶ 70} Thus, in *Stahl* and *Muttart*, in which the questions eliciting the statements were not asked as part of a police interrogation, we held that the

objective–witness test was applicable. Such is the case here.

Selecting the proper test

{¶ 71} In order to determine whether a statement is testimonial, based upon precedent from the United States Supreme Court and this court's law, we must first determine which test to apply. The *Davis* police-interrogation test must be applied if the interviewer is a law-enforcement officer or asks questions on behalf of law enforcement. Otherwise, the objective-witness test must be applied. In order to decide which test to apply, the dispositive inquiry is the presence or absence of a law-enforcement interrogator. *Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, at ¶ 28.

{¶ 72} With these governing principles in mind, I turn my attention to the out-of-court statements at issue here.

B

This was not a police interrogation

Teachers are not law enforcement and these teachers did not question L.P at the direction of law enforcement

{¶ 73} The teachers were clearly not law-enforcement officers. Whitley and Jones were employed by the Council for Economic Opportunities of Greater Cleveland Head Start, not by a law-enforcement agency. And there is absolutely no indication that these teachers questioned L.P. for law enforcement. *Compare State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶ 35-36 (*Davis* applies when an interviewer who is not a law-

enforcement officer asks questions on behalf of law enforcement). Police did not, for example, ask the teachers, who had a relationship with the child, to question the child on their behalf. Police did not tell the teachers what questions to ask. Police did not observe the questioning. The police were not even aware of L.P. at the time the teachers questioned him. *Compare id.* at ¶ 31. The police simply were not involved in the questioning in any way.

{¶ 74} Therefore, Jones and Whitley should be treated as law-enforcement interrogators for Confrontation Clause purposes only if they can be deemed agents of law enforcement because they had a duty to report child abuse.

Teachers are not law enforcement merely because they have a mandatory duty to report child abuse

{¶ 75} The United States Supreme Court has yet to decide whether a duty to report child abuse under state law transforms a civilian into a law-enforcement agent for purposes of Confrontation Clause analysis. For the reasons that follow, I would hold that it does not. A person who asks a child questions about an injury is not acting on behalf of law enforcement merely because she is required to report abuse or a suspicion of abuse. This conclusion is compelled by the purpose of Ohio's child-abuse-reporting statute and the duty that it imposes.

Ohio's child-abuse-reporting statute

{¶ 76} "Child abuse is a pervasive and devastating force in our society." *Yates v. Mansfield Bd. of Edn.*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 861, ¶ 12. "It has long been considered 'a problem of epidemic proportions. * * * By 1973, child abuse

was recognized as the most common cause of death of small children in the United States.'" *Id.*, quoting 6 American Jurisprudence Proof of Facts 2d, Failure to Report Suspected Case of Child Abuse, Section 1, at 351 (1975). Child abuse is not confined to the home. *Id.* Tragically, children are also sometimes abused and neglected by the institutions meant to care for them. *Id.*

{¶ 77} Because children are often helpless to protect themselves, the legislatures in all 50 states, the District of Columbia, and three territories have enacted child-abuse-reporting statutes. *Id.* at ¶ 13. In Ohio, R.C. 2151.421 is the "mechanism for identifying and protecting abused and neglected children." *Id.* at ¶ 24. R.C. 2151.421 requires certain persons, including teachers, to report suspected child abuse or neglect discovered in an official or professional capacity.[2] *See Campbell v. Burton*, 92 Ohio St.3d 336, 342, 750 N.E.2d 539 (2001). The statute requires the persons designated to report any knowledge or reasonable cause to suspect that a child has suffered or faces a threat of suffering any injury that reasonably indicates abuse or neglect. The statute was "intended to reach potential victims of child abuse, as well as children who have already suffered abuse." *Yates*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 861, ¶ 24.

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[2] Anyone, including a person who has no duty to report abuse or a person who has a duty to report but gains knowledge of the abuse in an unofficial capacity, may report that information. R.C. 2151.421(B).

{¶ 78} Thus, "the primary purpose of reporting is to facilitate the protection of abused and neglected children rather than to punish those who maltreat them." *Id.* at ¶ 25. The General Assembly "considered identification and/or prosecution of the perpetrator to be a necessary and appropriate adjunct in providing such protection." (Emphasis added.) *Id.* But any prosecutorial purpose is secondary. *Id.*

{¶ 79} In order to achieve the goal of protecting children from abuse and neglect, "the General Assembly had to encourage those with special relationships with children, such as doctors and teachers, to report known or suspected child abuse." *Campbell*, 92 Ohio St.3d at 342, 750 N.E.2d 539. The following persons are required to report knowledge of or a suspicion of abuse or neglect:

> any person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist; practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other health care professional; licensed psychologist; licensed school psychologist; independent marriage and family therapist or marriage and family therapist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; administrator or employee of a residential camp or child day camp; administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school

> authority; person engaged in social work or the practice of professional counseling; agent of a county humane society; person, other than a cleric, rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion; employee of a county department of job and family services who is a professional and who works with children and families; superintendent, board member, or employee of a county board of developmental disabilities; investigative agent contracted with by a county board of developmental disabilities; employee of the department of developmental disabilities; employee of a facility or home that provides respite care in accordance with section 5123.171 of the Revised Code; employee of a home health agency; employee of an entity that provides homemaker services; a person performing the duties of an assessor pursuant to Chapter 3107 or 5103 of the Revised Code; or third party employed by a public children services agency to assist in providing child or family related services.

R.C. 2151.421(A)(1)(b).

{¶ 80} The statute recognizes that the designated persons, "when acting in their official or professional capacity, hold unique positions in our society. They are not only the most likely and qualified persons to encounter and identify abused and neglected children, but they are often directly responsible for the care, custody, or control of these children in one form or another." *Yates*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 861, ¶ 30.

{¶ 81} Each of the persons required to report, including teachers, interacts with children in their professional or official capacity independently of a duty to report abuse. Each is in some way already responsible for the care and protection of children. *Id.*

{¶ 82} "The primary duty of school officials and teachers * * * is the education and training of young people." *New Jersey v. T.L.O.*, 469 U.S. 325, 350, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (Powell, J., concurring). To that end, schools have a legitimate need to maintain a secure and orderly environment in which learning can take place. *Id.* at 340 (majority opinion). Similarly, teachers have "a special responsibility to protect those children committed to their care and control." *Yates*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 861, at ¶ 45.

{¶ 83} The duty to report abuse does not change the official or professional capacity of teachers or anyone required to report abuse or neglect. The duty is to report knowledge or suspicion of abuse or neglect that the designated persons encounter while doing their ordinary work. Therefore, the duty to report child abuse does not change the primary purpose of the designated professionals' interaction with children.

{¶ 84} Moreover, there is absolutely no indication that the General Assembly intended to deputize mandatory reporters as agents of law enforcement. The reporting statute does not impose a duty to ask any questions about suspicious injuries or conditions or to undertake any investigation. A person who is required to report abuse might make inquiry into a

suspicious situation, as the teachers here did, but such an inquiry stems not from the statutory duty to report child abuse or neglect. It comes from a professional responsibility or concern for the child—to find out what happened to the child. Teachers, by way of apt example, have a professional responsibility upon observing a student's injuries to inquire about those injuries, to protect that child and the other children in the classroom, and to maintain a safe and structured environment in which learning can take place. It would be negligent, if not reckless, for a teacher to fail to inquire about the source of newly inflicted, serious injuries on a small child in her care, irrespective of R.C. 2151.421.

{¶ 85} What the statute requires is actually quite minimal: when teachers, or others who are required to report, encounter suspected abuse or neglect in their official capacity, they must report it. In turn, the children's services agency or the police—not the mandatory reporters—are responsible for investigating the injury or condition "to determine the circumstances surrounding the injuries, abuse, or neglect or the threat of injury, abuse, or neglect, the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible." R.C. 2151.421(F)(1). That any information received by one who is required to report may cause the state to initiate an investigation or may later be used by the state for another purpose—to prosecute a perpetrator—"does not change the fact that the statements were not made for the state's use." *Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, at ¶ 62.

{¶ 86} It does not appear that any court has held that a mandatory reporter is an agent of law enforcement when, as here, there is no police involvement in the interview.[3] But several courts have held that a mandatory reporter is not an agent of law enforcement when there is little or, as here, no police involvement. *E.g., United States v. Squire*, 72 M.J. 285, 288-289 (Armed Forces Cir.2013) (refusing to classify a physician as an agent of law enforcement when there was no direct law-enforcement involvement in the questioning, even though the physician had a mandatory duty to report child abuse, conducted a forensic examination on a child, and completed state-mandated forms to report suspected child abuse; the primary purpose of the interview was medical diagnosis and treatment); *Seely v. State*, 373 Ark. 141, 154-155, 282 S.W.3d 778 (2008) (refusing to classify a social worker as an agent of law enforcement when the police did not "instigate, observe, or participate in" the questioning, even though the social worker was a mandatory reporter and was tasked with interviewing all children brought to the hospital for treatment of physical or sexual abuse; the primary purpose of the interview was to ensure the victim's continued safety

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[3] My research discloses that there is one Illinois case, a plurality decision, that might be construed to support the majority's position. *People v. Stechly*, 225 Ill.2d 246, 870 N.E.2d 333 (2007). But the court in that case stated, "We are not holding that every mandated reporter acts as an agent of law enforcement in every interview." *Id.* at 301. And numerous decisions in that state call Stechly into question. *See*, e.g., *People v. Richter*, 2012 IL App. (4th) 101025, 977 N.E.2d 1257, at ¶ 163.

and to define the scope of the medical examination); *State v. Spencer*, 2007 MT 245, 339 Mont. 227, 169 P.3d 384, ¶ 18, 20-21 (refusing to classify a licensed foster parent and social worker as agents of law enforcement when there was no indication that the social worker knew that police awaited the results of her interview with a child who was the victim of sexual assault; (1) the social worker's interview was solely for the purpose of counseling the child and (2) the child's statements to the foster parent were spontaneous and not the result of questioning); *Krasky*, 736 N.W.2d at 641-643 (concluding that the primary purpose of a nurse's interview of a child victim was to assess and protect the child's health and welfare in accordance with the state law that required the nurse to report child abuse); *State v. Bobadilla*, 709 N.W.2d 243, 254-255 (Minn.2006) (recognizing that the purpose of the Minnesota statute requiring certain people to report child abuse is to protect the health and welfare of children; therefore, the primary purpose of a family-services worker's interview of a child was to assess the child's risk, identify any need for social services, protect the welfare of the abused or neglected child, and prevent further abuse, not to produce a statement for trial).[4]

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[4] If the majority is correct that as a matter of federal constitutional law, a person asking questions of a child is an agent of law enforcement merely because she has a mandatory duty to report child abuse, what is the application of the majority's decision in the 18 states and Puerto Rico, where *any person* who suspects child abuse has a mandatory duty to report? United States Department of Health and Human Services, *Mandatory Reporters of Child Abuse and Neglect*,

{¶ 87} For all of these reasons, I would hold that a teacher asking a child questions about an injury is not an agent of law enforcement for the purposes of determining whether a statement is testimonial and thus excluded by the Confrontation Clause merely because the teacher has a legal duty to report child abuse pursuant to state statute.

{¶ 88} The majority reaches the opposite conclusion and therefore applies the *Davis*, police-interrogation test. By doing so, it proceeds on the assumption that the teachers could have only two purposes for interacting with L.P.—to resolve an emergency or to create evidence against Clark. Because it concludes that there was no emergency, it concludes that the statements were elicited so that they could be used at Clark's trial. That analysis fails to acknowledge the purpose for which the teachers and the student were together in the first place. And it fails to account for a teacher's duty to protect her students and to maintain a secure and orderly classroom in which learning can take place.

{¶ 89} What follows is in my view, the far sounder approach.

C

Viewed objectively, the teachers' primary purpose in questioning L.P was not to accuse Clark or to create evidence for use at his trial

{¶ 90} A reasonable person would believe that Whitley and Jones questioned L.P. to protect him

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available at www.childwelfare.gov/responding/mandated.cfm (accessed August 21, 2013).

and to maintain a safe and structured classroom, not to create evidence for use at Clark's trial.

{¶ 91} Context is important. The teachers' questioning of L.P bears no resemblance to the formal, stationhouse interrogation in *Crawford*. The questioning took place in a classroom, not in a police station, not at a crime scene, not on a 9-1-1 telephone call. The classroom is a place associated with education and training, nurturing and guidance. Only teachers and students—no police—were present in the classroom.

{¶ 92} Moreover, the questioning was informal and spontaneous and thus strongly suggests that the teachers were questioning L.P. in an attempt to protect him. Whitley noticed a single injury to L.P.'s eye when they were in the lunchroom. In the classroom, she saw other marks on his face. Shocked by the injuries, Whitley did not yet know how L.P. had been injured. She immediately questioned L.P. on the spot: "Oh, what happened?"[5] Whitley then notified the teacher in charge, Jones. Jones approached L.P in the classroom. Jones also immediately questioned L.P. on the spot in the classroom. When she first saw L.P., Jones exclaimed "Whoa, what happened?" Jones testified that L.P. seemed "kind of bewildered" but then said something like "Dee, Dee." Jones, wanting to know if L.P. was talking about another child, asked, "Is he big or

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[5] The questions posed by the teachers are the same as those posed in *Bryant* and approved by the court as not eliciting testimonial statements, even when posed by police officers. *Bryant*, ___U.S. at ___, 131 S.Ct. at 1166, 179 L.Ed.2d 93.

little?" Jones testified that L.P said, "Dee is big." Once Jones heard that someone had caused the injuries, she removed L.P from the classroom to save him from embarrassment and to avoid alarming any of the other children. In other words, Jones removed L.P. from the classroom to maintain order in the classroom.

{¶ 93} The questioning was also fluid and somewhat confusing. L.P. was very young, only three and one-half years old, and had been seriously injured. Jones testified that L.P seemed "bewildered." L.P.'s statements were reflexive because he answered a different question than the one asked. When asked what happened, L.P. answered not "what" but "who." As the teachers were questioning the child, they did not know whether a person had deliberately caused the injuries or whether the child might have fallen or accidentally been hurt. They did not know whether he had an eye infection, whether another student had elbowed him, or whether L.P. had accidentally stuck a pencil in his own eye. They did not know if the injuries had happened at home, at school, or somewhere else. Even when they heard what they thought was a name, they had no way of knowing whether L.P.'s injuries were a result of abuse or of an accidental injury from playing with another child. It was only when they learned that Dee was big that they began to understand that an adult, not a child, had caused the injuries. The teachers' questioning allowed them to understand that Dee, someone whose name they did not recognize, had caused the injuries. Therefore, it enabled them to determine that L.P.'s injuries had not been caused by anyone in the school. The teachers' questions allowed them to

determine whether something was happening in the classroom or on the school grounds that they needed to address, i.e., to protect L.P at that moment, and to maintain order in the school.

{¶ 94} An objective witness would reasonably believe that the teachers' questions enabled them to adequately assess the risk of harm for both L.P. and the other children in the school, that when they asked L.P what had happened, it was to understand how he had been injured and, if necessary, to protect him and the other students from a school-based danger and to maintain a secure and orderly classroom in which learning could take place, not to create evidence for Clark's trial.

D

The wake of the majority's decision: the state of the law in Ohio

{¶ 95} The majority reaches an illogical result, the straightforward application of which dictates that when a teacher notices that a child is hungry and asks whether the child had breakfast, the teacher is a police interrogator because the child might disclose reportable neglect. When a licensed psychologist questions a child about insomnia, the majority would conclude, the psychologist is a police interrogator because the child might disclose reportable abuse. When a dentist observes an injury in a child's mouth and asks the child "what happened," under the majority holding, the dentist is an agent of law enforcement for Confrontation Clause purposes. Common sense dictates that those conclusions are incorrect. So does our case law. *See Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, at ¶

63 (statements made to a social worker and counselors—who are required to report suspected abuse—did "not even remotely" implicate the evils that the Confrontation Clause was designed to avoid, because the statements were elicited for the purpose of medical diagnosis and treatment), and *Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶ 33 (statements made to a social worker—who is required to report abuse—for the purpose of medical diagnosis and treatment were not testimonial). *See also In re J.M.*, 4th Dist. Pike No. 08CA782, 2009-Ohio-4574, at ¶ 49 (concluding that *Muttart* foreclosed the argument that out-of-court statements are testimonial merely because they are made to a mandatory reporter). At least before today, it did.

{¶ 96} The majority effectively overrules *Muttart* and modifies the bedrock of *Stahl*. At first blush, the holding in *Stahl*—that an adult's statements to a medical professional are analyzed under the objective-witness test—would remain undisturbed. In *Stahl*, we applied the objective-witness test to a woman's out-of-court statements to a nurse practitioner. A nurse practitioner is required to report suspected child abuse or neglect. *See* R.C. 2151.421(A)(1)(b). According to the majority's reasoning in the present case, statements to a nurse practitioner performing a sexual-assault examination on a child would be analyzed under the *Davis*, police-interrogation test, not the objective-witness test used in *Stahl*. Confrontation Clause law does not countenance such a conclusion. *See Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, at ¶ 41 (declining to apply the objective-witness test when a police officer questioned a child because the

identity of the interrogator, not the age of a declarant, determines which test should be applied).

{¶ 97} The problems with the majority's decision do not end there.

{¶ 98} Consider that the duty to report abuse includes the duty to report a suspicion about abuse or neglect of persons with developmental disabilities. R.C. 2151.421(A)(1)(a) (the duty to report abuse or neglect extends to the age of 21 for persons with developmental disabilities) and 5123.61(C) (imposing a duty to report suspected abuse or neglect of a person with mental retardation or developmental disabilities on several classes of people, including licensed nurses). The majority's holding now requires that statements made to a nurse practitioner by an adult who does not have a developmental disability must be assessed under the objective-witness test, but statements to a nurse practitioner by an adult with developmental disabilities must be analyzed under the *Davis* police-interrogation test because the nurse practitioner has a mandatory duty to report suspected abuse or neglect of that patient.

{¶ 99} It gets more complicated.

{¶ 100} Under R.C. 5101.61, certain people, including registered nurses, have a duty to report suspicions of abuse, neglect, or exploitation of an adult who is at least 60 years of age and who is "handicapped by the infirmities of aging or who has a physical or mental impairment which prevents the person from providing for the person's own care or protection." R.C. 5101.60. Under today's ruling, *Stahl* has been refined to require that statements

made by those adults are also analyzed under the Davis police-interrogation test.

{¶ 101} The net effect of the majority's holding is to treat differently out-of-court statements made by those who are the most vulnerable and the most in need of protection—children, people with developmental disabilities, and the elderly—from those made by most adults. This approach is far from what the court in *Crawford* intended and far from the evils that the Sixth Amendment was intended to thwart.

{¶ 102} The majority's holding is, in reality, an attack on Evid.R. 807,[6] which permits admission of

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[6] Evid.R. 807(A) provides:

> An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid.R. 802 if all of the following apply:
>
> (1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to

certain hearsay statements made by child victims about physical or sexual abuse. Even though the state-law evidentiary issue is not before us, it occupied more than half of the oral-argument time in this case. The majority's insistence on undermining Evid.R. 807 wreaks havoc on our Confrontation Clause analytical framework.

{¶ 103} More troubling, the majority creates a beneficial catch-22 for pedophiles and other abusers of children. The very people who have the expertise and opportunity to recognize child abuse are now *prohibited* in Ohio from testifying about any out-of-court statements that a child makes about abuse or neglect when the child, for whatever reason, is unable to testify.

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fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

{¶ 104} Child abusers often evade prosecution because the victims are unable to disclose the abuse, let alone testify. Evid.R. 807, which applies only when the child victim's testimony is not reasonably obtainable, sought to ameliorate the difficulty in securing prosecutions in these difficult cases. Under the majority's rule, if a child victim of abuse is not able to testify, a mandatory reporter's testimony regarding the child's out-of-court statements about the abuse is barred by the Confrontation Clause. The majority is well aware that in the converse situation, when a child victim is able to testify, hearsay testimony about the abuse is then barred by Evid.R. 807.

{¶ 105} Children in Ohio will go unprotected.

{¶ 106} And the majority reaches its result by misapplying the United States Supreme Court's precedent in Confrontation Clause law. Its rationale is so faulty that it invites that court to now address the issues that it reserved in *Davis* and to provide uniform guidance on the issue of the effect, for Confrontation Clause purposes, of a duty to report child abuse. I can only hope that four justices vote to accept that invitation.

CONCLUSION

{¶ 107} This case involves teachers in a classroom dealing with a common problem: an injured child. I cannot agree with the majority that the United States Supreme Court's test for statements elicited by police officers controls.

{¶ 108} I would reverse.

LANZINGER and FRENCH, JJ., concur in the foregoing opinion.

Timothy J. McGinty, Cuyahoga County Prosecuting Attorney, and Mark J. Mahoney, Assistant Prosecuting Attorney, for appellant.

Robert L. Tobik, Cuyahoga County Public Defender, and John T. Martin and Erika B. Cunliffe, Assistant Public Defenders, for appellee.

Michael DeWine, Attorney General, and Alexandra T. Schimmer, Solicitor General, and Samuel Peterson, Assistant Attorney General, for amicus curiae Ohio Attorney General, in support of appellant.

Timothy Young, Ohio Public Defender, and Jeremy J. Masters, Assistant Public Defender, for amicus curiae Ohio Public Defender, in support of appellee.

APPENDIX B

SUPREME COURT OF OHIO

State of Ohio

v.

Darius Clark

No. 2012–0215
Filed: December 24, 2013

RECONSIDERATION ENTRY

It is ordered by the court that the motion for reconsideration in this case is denied.

(Cuyahoga County Court of Appeals; No. 96207)

/s/Maureen O'Connor
Maureen O'Connor
Chief Justice

APPENDIX C

SUPREME COURT OF OHIO

State of Ohio

v.

Darius Clark

No. 2012–0215
Appeal from the Court of Appeals
Filed: October 30, 2013

JUDGMENT ENTRY

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed, consistent with the opinion rendered herewith.

It is further ordered that mandates be sent to and filed with the clerks of the Court of Appeals for Cuyahoga County and the Court of Common Pleas for Cuyahoga County.

(Cuyahoga County Court of Appeals; No. 96207)

/s/Maureen O'Connor
Maureen O'Connor
Chief Justice

APPENDIX D

Court of Appeals of Ohio

Eight Appellate District
County of Cuyahoga

JOURNAL ENTRY AND OPINION

No. 96207

STATE OF OHIO,

Plaintiff-Appellee

vs.

DARIUS CLARK,

Defendant-Appellant

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-536300

BEFORE: Sweeney, J., Blackmon, P.J., and E. Gallagher, J.

RELEASED AND JOURNALIZED: December 22, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Darius Clark ("defendant") appeals his multiple convictions for felonious assault, child endangerment, and domestic violence regarding his girlfriend's two children, and his associated 28-year prison sentence. After reviewing the facts of the case and pertinent law, we reverse and remand for a new trial.

{¶ 2} During the time pertinent to this case, defendant was living with his girlfriend ("mother") and her two children, L.P., who was born on September 26, 2006, and A.T., who was born on May 17, 2008. From March 8 through March 12, 2010, the children were under the care of defendant while mother was staying with a friend. On March 16, 2010, mother again left the children in defendant's care. At all other times pertinent to this appeal the children were under the care of defendant and mother.

{¶ 3} On March 17, 2010, L.P.'s preschool teachers noticed bruises on him and reported possible abuse to the authorities. On March 18, 2010, a social

worker found the children at defendant's mother's house, where they were being looked after by two teenagers. After awhile, defendant's mother arrived at the house, and eventually, the social worker took the children to the hospital. According to the doctor who examined the children, L.P. had multiple bruises in various stages of development and abrasions consistent with being whipped with a belt. A.T. had multiple bruises and burn marks, a swollen hand, and a pattern of sores at her hairline consistent with braids being ripped out of her head. The doctor suspected child abuse and estimated that the injuries occurred between February 28 and March 18, 2010. In response to questions from several adults, L.P. stated that "Dee did it." It is undisputed that defendant's nickname is "Dee."

{¶ 4} On April 15, 2010, defendant and mother were charged with the following: five counts of felonious assault in violation of R.C. 2903.11(A)(1), two counts of endangering children in violation of R.C. 2919.22(B)(1), and two counts of domestic violence in violation of R.C. 2919.25(A). Mother pled guilty to three of the counts, and the court postponed her sentencing until after defendant's trial.

{¶ 5} On November 16, 2010, the court held a hearing and found four-year-old L.P. incompetent to testify. The court also summarily denied defendant's motion in limine requesting that evidence of L.P.'s out-of-court statements identifying defendant be excluded from trial. On November 22, 2010, a jury found defendant guilty of all counts except one of the felonious assault charges concerning A.T. The court sentenced defendant to eight years in prison for each felonious assault conviction, four years in prison for

each count of endangering children, and six months in prison for each count of domestic violence. The court ran three assault sentences and one endangering children sentence consecutively for an aggregate of 28 years in prison.

{¶ 6} Defendant appeals and raises nine assignments of error for our review. We address the assignments of error out of order where appropriate, starting with assignments of error three and four.

{¶ 7} III. "The trial court violated Mr. Clark's confrontation clause rights pursuant to the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution by admitting prejudicial out-of-court statements by [L.P.]."

{¶ 8} IV. "The trial court violated Mr. Clark's confrontation clause rights pursuant to the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution when it erroneously found that the requirements of Ohio Rule of Evidence 807 had been satisfied."

{¶ 9} In the instant case, the court denied defendant's motion in limine and ruled admissible L.P.'s out-of-court statements that "Dee did it." Seven witnesses testified as to what L.P. stated: Cleveland police detective Jody Remington; Cuyahoga County Department of Children and Family Services [CCDCFS] social worker Sarah Bolog; CCDCFS social worker Howard Little; L.P.'s assistant preschool teacher Ramona Whitley; L.P.'s lead preschool teacher Debra Jones; the children's maternal grandmother; and the children's maternal great aunt.

{¶ 10} Defendant argues that the court erred by admitting L.P.'s statements at trial, because the statements were testimonial in nature, L.P. was declared incompetent to testify, and defendant did not have the opportunity to cross-examine L.P.

The Confrontation Clause

{¶ 11} We review issues concerning Confrontation Clause violations under a de novo standard. *State v. Babb*, Cuyahoga App. No. 86294, 2006-Ohio-2209. Pursuant to the Sixth Amendment to the United States Constitution, out-of-court statements that are testimonial in nature are inadmissible unless the declarant is unavailable and the defendant was given a prior opportunity for cross-examination. *Crawford v. Washington* (2004), 541 U.S. 36, 52, 124 S.Ct. 1354, 158 L.Ed.2d 177. This test does not apply to nontestimonial hearsay. Id. See, also, *Michigan v. Bryant* (2011), 562 U.S. ___, 131 S.Ct. 1143, 1167, 179 L.Ed.2d 93 (holding that the statements at issue were not testmonial and "leav[ing] for the [state] courts to decide on remand whether the statements' admission was otherwise permitted by state hearsay rules").

{¶ 12} Thus, as a threshold matter, courts must determine whether statements are testimonial before subjecting them to *Crawford* standards. Id. at 51-52. Testimonial statements are, among other things, "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. (Internal citations omitted.)

{¶ 13} The definition of testimonial statements was further scrutinized in *Davis v. Washington*

(2006), 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224, where the United States Supreme Court held the following: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

{¶ 14} In *Davis*, the victim's statements to a 911 operator were found to be nontestimonial, as their primary purpose was "to enable police assistance to meet an ongoing emergency." Id. at 828. However, the victim's statements to police officers who responded to the domestic-violence call were held to be testimonial, because "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." Id. at 830.

{¶ 15} The Ohio Supreme Court applied this body of law to statements made to a medical professional in *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834. The *Stahl* court distinguished *Davis*, and held that a rape victim's statements to a nurse practitioner during a medical examination were nontestimonial, because the primary purpose was receiving medical treatment. Id. at ¶25. "In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is

relevant only if it could affect a reasonable declarant's expectations." Id. at paragraph two of the syllabus.

{¶ 16} In *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, ¶30, the Ohio Supreme Court further addressed this issue, holding that "to determine whether a child declarant's statement made in the course of police interrogation is testimonial or nontestimonial, courts should apply the primary-purpose test" enunciated in *Davis*. The court also stated that the objective-witness test found in *Stahl* applies when the interrogator is not in law-enforcement. *Siler* at ¶28. The distinction between the two tests is "based on the identity of the interrogator and the purpose of the questioning." Id. Additionally, the court concluded that "the age of a declarant is not determinative of whether a testimonial statement has been made during a police interrogation." Id. at ¶41.

{¶ 17} The issue of child victims' testimony was addressed most recently by the Ohio Supreme Court in *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶11, where the court determined the following: "whether, in a criminal prosecution, the out-of-court statements made by a child to an interviewer employed by a child-advocacy center violates [sic] the right to confront witnesses *** " *Arnold* recognized that the child advocate who interviewed the victim worked in a "dual capacity," such that the questioning "might produce both testimonial and nontestimonial statements." Id. at ¶41. The court explained the child advocate's dual capacity as follows: "she was both a forensic interviewer collecting information for use by the

police and a medical interviewer eliciting information necessary for diagnosis and treatment." Id. at ¶44.

{¶ 18} *Arnold* concluded that statements regarding "medical diagnosis and treatment are nontestimonial and are admissible without offending the Confrontation Clause. *** We further hold that statements *** that serve primarily a forensic or investigative purpose are testimonial and are inadmissible pursuant to the Confrontation Clause when the declarant is unavailable for cross-examination at trial." Id. Additionally, the court held that the "forensic statements" were subject to a harmless error review. Id.

{¶ 19} In the instant case, L.P.'s statement to Detective Remington that "Dee did it" was primarily investigative or forensic in nature, as the detective was clearly a member of law enforcement. Detective Remington testified about her interaction with L.P. as follows: "As long as we played, he was okay. He was pretty enamored with my badge, like most little boys are. So I gave him the badge, and I told him I'm the police, and I'd like to help you. I'd like to make sure nobody ever hurts you like this again. Can you tell me who hurt you?" There is no suggestion that L.P.'s identification of defendant as the abuser was elicited for medical purposes or to assist an ongoing police emergency. Therefore, this testimony was improperly admitted at trial.

{¶ 20} Bolog testified that she is an investigator for CCDCFS. Her primary duties are to "gather information to determine if, according to the Ohio Revised Code, there is substantial evidence for child abuse or neglect or dependency issues." She testified

that the "bottom line" purpose for her investigation is "making sure that the minors in Cuyahoga County are safe and have stable provisions for their basic needs." Bolog testified that L.P. told her who abused him on two occasions:

{¶ 21} "The first time was in [defendant's mother's house] and it was right before the commotion * * * and, you know, the police were there and everything was going on. * * * I was showing him pictures of my dogs, and we were trying to gain that trust. And in talking about things non-related, we would throw in a question about the investigation. So it was like fun question, fun question, fun question, how did you get this mark on your face? And his body language changed. * * * And he said—he put his head down and he said, Daddy did it. Dee did it. And he just said Dee did it.

{¶ 22} "And then the second instance where he said it in front of me was at the hospital. Detective Remington and her partner had come in. * * * And [L.P.] was very interested in her badge and handcuffs, you know. * * * And at this point, she had a picture of [defendant]. And she asked [L:P.] if he knew who this was, and he said, you know—looked at it and * * * turned his head and said, It was daddy. It was Dee. So when asked * * * how did you get these marks? What happened? And he said again, Dee did it."

{¶ 23} We analyze L.P.'s statements to Bolog under the framework of *Arnold*, insomuch as Bolog, as a social worker, acted in a dual capacity. In *Arnold*, the court found that some of the victim's statements to the child advocate were made with a primary purpose to "gather forensic information to

investigate and potentially prosecute a defendant for the offense." *Arnold* at ¶33. These statements included: the "assertion that Arnold shut and locked the bedroom door before raping her; her descriptions of where her mother and brother were while she was in the bedroom with Arnold, of Arnold's boxer shorts, of him removing them, and of what Arnold's 'pee-pee' looked like; and her statement that Arnold removed her underwear." Id. at ¶34.

{¶ 24} The *Arnold* court reasoned that the statements "involved a description of past events," specifically concerning the abuse, the victim had been discharged from the hospital and there was no medical emergency, and "the interview was rather formal, more akin to the videotaped, planned interview of *Crawford* than to the frantic 9-1-1 call or the sequestered but spur-of-the moment interview recounted in *Davis*." Id. at ¶35.

{¶ 25} The court additionally determined that other statements made during the same interview were "medically necessary," because, for example, certain information can trigger the administration of a rape kit or a test for sexually transmitted diseases. Id. at ¶39. See, also, *In re J.M.*, Pike App. No. 08CA782, 2011-Ohio-3377, ¶39 (holding that a child-victim's statement that the incident occurred on July 3, 2007 was not testimonial because "placing [the] injury in a temporal context served a medical-diagnostic purpose").

{¶ 26} Upon review, we find that Bolog was acting as an agent of law enforcement when L.P. identified defendant as the person who abused him. This information established defendant as a suspect in the investigation. Furthermore, although removing

victims from abusive situations may fall under Bolog's duty to keep children safe, under the circumstances of the instant case there was no evidence of an ongoing police emergency. Accordingly, L.P.'s statements to Bolog were testimonial, and because L.P. was not subject to cross-examination, the statements were improperly admitted at trial.

{¶ 27} Little testified that he is an intake social worker at CCDCFS, and his job duties are "to investigate allegations of abuse and neglect, dependency, [and] emotional maltreatment." Asked what he talked to L.P. about when he arrived at the daycare, Little testified as follows:

{¶ 28} "I talked to L.P. basically about how did he receive the bruising that was on his left facial area and also about basically trying to get more information about who was * * * Dee.

{¶ 29} "* * *

{¶ 30} "[L.P.] mentioned that Dee was his father, that he lived in the home. He had mentioned that—first that he had sustained some marks and bruises from falling down the stairs. But when I re-questioned him and tried to make him feel a little bit more comfortable, he later stated that the bruises came because he didn't put his toys back up and they were thrown all over the floor. So that's why he got a spanking for that."

{¶31} Upon review, we find that Little's discussion with L.P. was part of the preliminary investigation to aid law enforcement. There is no indication that L.P.'s statements were made in the midst of a police emergency. Additionally, there is

no evidence that the statements were made in the context of medical treatment or diagnosis. Accordingly, L.P.'s statements to Little were testimonial and inadmissible at trial.

{¶ 32} Two of L.P.'s teachers testified at defendant's trial about L.P.'s out-of-court statements: It is an issue of first impression for this court whether statements made to teachers may be testimonial in nature, and thus subject to analysis under *Crawford*.

{¶ 33} Ramona Whitley, who was L.P.'s assistant preschool teacher at the time the abuse was discovered, testified that on March 17, 2010, she noticed that L.P.'s eye was bloodshot and he had "welt marks" on his face. Whitley testified that as part of her job, she is "supposed to always observe [the children], look for different things, what's going on with them." Whitley brought L.P.'s injuries to the attention of a co-worker. Whitley was instructed to make "the 696 call," which she explained is "a number that you call if a child is in need for some sort of service, if the child is hurt, being physically abused, sexually abused, there's a number that we call to make sure everything's okay." Whitley testified that she is a "mandatory reporter," meaning that "by law I have to report what is going on when it comes to the safety of a child." Whitley testified that when she asked L.P what happened, he gave three different answers: that he fell; that he did not know; and that "Dee did it." Additionally, Whitley made a statement to the Cleveland police two to three days later.

{¶ 34} Debra Jones, who was L.P.'s lead preschool teacher, testified that on March 17, 2010, Whitley

brought L.P.'s injuries to her attention. Jones took L.P. out of the classroom and asked him what happened. L.P. looked "bewildered *** he almost looked uncertain, but he said, Dee did it." Jones testified that she took L.P. to her supervisor's office and Whitley called 696-KIDS because "we saw enough to make the call." Jones testified that two days later she met with and gave a statement to a detective from the Cleveland Police Department.

{¶ 35} Upon review, we find that the primary purpose of Jones and Whitley questioning L.P. was to report potential child abuse to law enforcement. Both teachers testified that their obligation to report is mandatory. We additionally find that it is reasonable for an objective witness to expect that statements made to a teacher while she is reporting suspected child abuse may be used at a later trial. Therefore, we conclude that L.P.'s statements to Whitley and Jones were testimonial and improperly admitted at defendant's trial.

Evid.R. 807

{¶ 36} Out-of-court statements that are not testimonial in nature are considered hearsay, which is generally inadmissible at trial, unless it falls within one of many exceptions to the rule against hearsay and is "sufficiently reliable for admission." See *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, ¶25. We review the admissibility of relevant evidence under an abuse of discretion standard. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. At issue are L.P.'s statements to grandmother and great aunt. Asked if she ever talked to L.P. "about who did this to him," great aunt testified that "[h]e laid in my lap, and he

told me Dee did it." Asked "did you ever find out who caused those injuries to the children," grandmother testified that "[L.P.] told me Dee."

{¶ 37} Defendant argues that these statements are inadmissible hearsay pursuant to Evid.R. 807(A), which states as follows:

{¶ 38} "An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing * * * any act of physical violence directed against the child is not excluded as hearsay under Evid.R. 802 if all of the following apply:

{¶39} "(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is

independent proof of the sexual act or act of physical violence.

{¶ 40} "(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

{¶ 41} "(3) There is independent proof of the sexual act or act of physical violence.

{¶ 42} "(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness."

{¶ 43} Defendant essentially argues that, under the circumstances in the instant case, L.P.'s statements were not reliable under the first element of Evid.R. 807(A), and that, under the third element, there was no independent proof that he was the perpetrator of the act of physical violence.

{¶ 44} In *State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576, 906 N.E.2d 427, ¶34, the Ohio Supreme Court held that "a hearsay statement of a child declarant can be admitted under Evid.R. 807 without a determination of the child's competence to testify."

{¶ 45} In Silverman, the child victim was killed; thus, the court did not determine whether she was competent to testify. *Silverman* limited the holding in *State v. Said* (1994), 71 Ohio St.3d 473, 644 N.E.2d 337, which required a finding of competency

prior to admitting a statement under Evid.R. 807. *Silverman* at ¶30.

{¶ 46} The instant case is distinguishable from *Silverman* and *Said*, because, after a hearing, the court found L.P incompetent to testify.

{¶ 47} "Counsel, * * * I believe – I've heard enough out of – this child is not competent to testify. Watching the he's gone already. Watching his demeanor on the stand – and it's, by the way, perfectly understandable to deal with this kind of behavior, but he's definitely not competent in this Court's opinion. So that's my ruling. He will not be able to testify as a witness."

{¶ 48} In applying the circumstances of the case at hand to Evid.R. 807, we must determine whether L.P. "was particulrly likely to be telling the truth" when stating that "Dee did it." First, the evidence is inconclusive as to whether these statements were spontaneous declarations by L.P or answers to questions posed by others. Second, L.P. repeatedly stated that Dee abused him; however, L.P also stated that a fall down the stairs caused the bruises and that he did not know how he got the bruises. Third, the evidence in the record shows that L.P.'s mental state was understandably somewhat unstable and that he was undergoing counseling. Fourth, the record is silent on L.P.'s "motive or lack of motive to fabricate." Fifth, L.P used terminology expected of a four-year-old – "Dee did it." Sixth, "the means by which the statement was elicited" is unclear from the record. We note, however, that all of L.P.'s statements previously analyzed under *Crawford* were made in response to investigative questions asked by adults. Seventh, the record does

not establish when L.P identified defendant as his abuser to his grandmother and great aunt.

{¶ 49} We turn to the third element of Evid.R. 807, which generally questions whether there is independent proof of the act of physical violence. However, in the instant case, the question is not whether the abuse occured; rather, it is "Who abused L.P.?" Under a similar fact pattern, the United States Court of Appeals, Sixth Circuit, found that admission of evidence identifying the abuser was not harmless error:

{¶ 50} "In the instant case, L.B.'s taped statements contained the only evidence that she had been raped by Mr. Gaston. While there was physical evidence that L.B. had been the victim of sexual abuse, the physical evidence did not support an inference that Mr. Gaston was the perpetrator. The denial of the right to cross-examine L.B. had a substantial and injurious effect on the jury's verdict. Accordingly we conclude that the trial court's errors were not harmless." *Gaston v. Brigano* (C.A. 6, 2006), 208 Fed.Appx. 376, 392.

{¶ 51} Pursuant to Crim.R. 52(A), "[a]ny error * * * which does not affect substantial rights shall be disregarded." In *State v. Cooper*, Cuyahoga App. No. 86437, 2006-Ohio-817, ¶19, we held that "[t]he defendant has a constitutional guarantee to a trial free from prejudicial error, not necessarily one free of all error. Where there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal."

{¶ 52} Upon review, we fmd that L.P.'s statements lacked the "particularized gurantees of trustworthiness" outlined in Evid.R. 807. Although Ohio law is not clear on this precise point, we are concerned with reconciling the court's finding L.P. incompetent to testify in November of 2010 with the court's finding that statements L.P. made eight months prior were reliable enough to be admitted at trial. Compare *State v. Street* (1997), 122 Ohio App.3d 79, 85, 701 N.E.2d 50 (opining that finding a child witness incompetent to testify requires the "conclusion that any earlier statements he made were inadmissible under Evid.R. 807. * * * We find it unreasonable to presume that [the child witness] might have been more competent at an earlier age, such as when the statements in question were made") (emphasis in original).

{¶ 53} Additionally, we find that the only direct evidence that defendant was the perpetrator was L.P.'s statements identifying him. The evidence shows that when mother left L.P. in defendant's care, L.P. was staying at defendant's mother's house with various family members. Therefore, we conclude that L.P.'s statements to grandmother and great aunt are inadmissible hearsay under Evid.R. 807. Coupled with L.P.'s improperly admitted testimonial statements under *Crawford*, we find prejudicial error in the court's ruling regarding L.P.'s statements that "Dee did it." We are aware of the sensitive nature of this case and any case concerning victims of child abuse. The injuries to these children are reprehensible, and the perpetrator deserves punishment. Notwithstanding, we must recognize and ensure "the Sixth Amendment's guarantee that, '[i]n all criminal prosecutions, the accused shall enjoy

the right * * * to be confronted with the witnesses against him.'" *Crawford*, 541 U.S. at 38. The right to a fair trial is paramount to the delivery of a just verdict.

{¶ 54} Accordingly, defendant's third and fourth assignments of error are sustained.

{¶ 55} Defendant's first assignment of error states as follows:

{¶ 56} I. "Mr. Clark's convictions with respect to counts 1 and 6 are not supported by legally sufficient evidence as required by state and federal due process."

{¶ 57} Specifically, defendant argues that the state failed to present sufficient evidence of serious physical harm to support the felonious assault and endangering children convictions regarding L.P. Both of these offenses contain an element of "serious physical harm," which is defined in R.C. 2901.01(A)(5) as follows:

{¶ 58} "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶ 59} "(b) Any physical harm that carries a substantial risk of death;

{¶ 60} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶ 61} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶ 62} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶ 63} When reviewing sufficiency of the evidence, an appellate court must determine, "after viewing the evidence in a light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492.

{¶ 64} Upon review, we find the following evidence in the record:

{¶ 65} Dr. Jeffrey Pennington, who is an emergency medicine physician, testified that he examined L.P. and A.T. for suspected child abuse on March 18, 2010. He observed "linear vertical abrasions with [bruising] on the upper torso, left chest, [and] bilateral medial thighs" of L.P. According to Dr. Pennington, these bruises were typical of "being beaten with objects that leave particular marks," and meant "that you were struck with something that left a very sharp mark" such as "a belt or something of that nature." L.P. also had two separate bruises near his left eye and "conjunctival hemorrhage," which is "bleeding in the white part of the eye which can result from minor trauma as well as being hit." L.P. had a mark on his left cheek, the size and shape of which indicated it might have been caused by a bite, and bruising on his arm, which was consistent with "finger marks from being grabbed."

{¶ 66} At the hospital, L.P. was given an acuity ranking of three on a scale of one to five. Dr. Pennington testified that this is an "intermediate range of acuity, meaning it's not life-threatening, but they should be seen within a reasonable time." L.P.'s final assessment was multiple linear abrasions and bruising "in different stages of development indicative of non-accidental trauma." Dr. Pennington explained that some of the bruising appeared brand-new and some of it was "days or longer older."

{¶ 67} L.P. and A.T.'s great-aunt, who now has custody of the children, testified that she saw them at the emergency room on March 18, 2010. L.P had a black eye and what looked like belt marks across his stomach and his back. L.P.'s black eye lasted "a couple of weeks," and the bruising on L.P.'s back made it uncomfortable for him to lay down for "a little bit over a month." According to the great aunt, L.P. continues to have headaches and nightmares and is in counseling once a week.

{¶ 68} According to the children's maternal grandmother, who also testified at trial, "it took a while" for L.P.'s bruises to go away, and "[m]entally, he's really messed up."

{¶ 69} Defendant argues that the instant case is analogous to *State v. Snyder*, Cuyahoga App. No. 94755, 2011-Ohio-1062 and State v. Ivey (1994), 98 Ohio App.3d 249, 648 N.E.2d 519, in which this court found insufficient evidence of serious physical harm in relation to child abuse. Upon review, however, we find that the facts of the case at hand are distinguishable in one substantial aspect: *Snyder* and *Ivey* involved single incidents of corporal

punishment, while the evidence in the instant case suggests that L.P. was the victim of recurrent abuse.

{¶ 70} Evidence in the record suggests that L.P. was whipped, hit, bit, and grabbed with enough force to leave lasting marks, some of which were located in and around his left eye. Dr. Pennington testified that L.P.'s injuries were in various stages of development, suggesting that L.P. was abused on more than one occasion. L.P.'s relatives testified that his bruises lingered, and the physical pain affected him for approximately one month after the injuries were inflicted. Additionally, there is evidence that L.P. suffers from nightmares and headaches, for which he receives counseling. L.P. was three and one-half years old when the abuse at issue occurred.

{¶ 71} We find that reasonable minds could have found that L.P. suffered serious physical harm as defined in R.C. 290 1.01 (A)(5)(a)-(e), in that he is undergoing counseling, he was incapacitated, he suffered temporary, serious disfigurement, and had chronic bruises. A reasonable trier of fact could infer that this abuse would result in acute pain to a three-and-a-half-year-old child. Defendant's first assignment of error is overruled.

{¶ 72} Pursuant to App.R. 12(A)(1)(c), defendant's remaining assignments of error are made moot by our disposition of assignments of error three and four. Defendant's convictions are reversed and this case is remanded for a new trial.

{¶ 73} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

PATRICIA ANN BLACKMON, P.J., and
EILEEN A. GALLAGHER, J., CONCUR

OPPOSITION BRIEF

ORIGINAL

No. 13-1352

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

THE STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

---

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Darius Clark, asks leave to file the accompanying brief in opposition to petition for writ of certiorari, without prepayment of costs, and to proceed *in forma pauperis*. Petitioner was found indigent and has been represented by court-appointed counsel in all proceedings in the courts of Ohio.

Accordingly, petitioner asks leave to proceed *in forma pauperis* in this Court. Petitioner's affidavit in support of this motion is attached.

Respectfully submitted,

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No. 13-1352

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2013

STATE OF OHIO,

Petitioner,

vs.

DARIUS CLARK,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION

FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

I, Darius Clark, being first duly sworn according to law, depose and say that I am the Resondent in the above-entitled case; that in support of my motion to

proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

Answer: YES I was last employed _____. My wages at that time were approximately _____ per month. -Work 48 hours/month-

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? minimum wage

Answer: SEE Answer to #2

3. Do you own any cash or checking or savings account?

Answer: NO

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: NO

I was found to be indigent by the Court of Common Pleas of Cuuyahoga County,Ohio, and permitted to pursue my appeal through the courts of the State of

Ohio without payment of costs.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Darren Clark

Subscribed and sworn to before me this 25th day of June 2014.

Notary Public

JEFFREY M. GAMBO
Notary Public State of Ohio
My commission has no expiration date

No. 13-1352

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF OHIO,

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DARIUS CLARK,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Ohio

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Ohio Supreme Court correctly applied this Court's *Davis/Bryant* primary purpose test to exclude as testimonial a three-year-old child's hearsay responses to formal questioning in the absence of any emergency, where only these inconsistent statements by the child identified respondent, and where the child had been found incompetent to testify after giving numerous irreconcilable responses to judicial questioning.

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INTRODUCTION

The Ohio Supreme Court followed this Court's guidance in *Davis v. Washington*, 547 U.S. 813 (2006), and *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), in ruling inadmissible under the Confrontation Clause a child's out-of-court statements to teachers who reported them to investigative authorities, Pet. App. 10a-16a. After discussing at length the principles articulated by this Court, the court below applied them to find the statements testimonial.

Petitioner and its *amici* either misrepresent or misunderstand what the Ohio Supreme Court held. As a consequence, their arguments for why correction or clarification by this Court is necessary all fail. But even if they were right this would be the wrong case to resolve the issues. The decision of the Eighth District Court of Appeals below found that similar hearsay statements made by the incompetent and unreliable child to two relatives violated Ohio Rule of Evidence 807 and were inadmissible. Pet. App. 63a-69a. The State chose not to appeal that holding which is both logically indistinguishable from the statements he made to the teachers and also the law of the case. As a consequence, any ruling by the Court would have no effect on L.P.'s statements and would be purely advisory.

Petitioner claims that the decision below conflicts with decisions of other state supreme courts, because it supposedly rested on the proposition that "the mere fact" that a statement is made "to a statutorily defined mandatory reporter make[s] the statement testimonial." Pet. 18. But that is not all

the reasoning applied by the Ohio Supreme Court here, or by any other court known to respondent. Instead, the court's recognition that "teachers act in at least a dual capacity, both as instructors and also as state agents to report suspected child abuse," Pet. App. 3a, 15a, led it to a full consideration of the facts at hand, as required in *Davis* and *Bryant*. *Id.* at 10a-17a. Among the factors relied on to find the statements testimonial were not only the teachers' "duties to report abuse," but also the absence of any complaint by the child or of any medical or other type of on-going emergency, and the substance and formal nature of the questioning, aimed at "ascertain[ing] facts of potential criminal activity and identify[ing] the person or persons responsible." *Id.* at 15a.

Ultimately, this case is a poor vehicle for further clarification of the Confrontation Clause's application in the context of child abuse cases. It is an extreme case in which the hearsay statements of a young child, who was ruled incompetent to testify because his answers to judicial questioning were uniformly inconsistent, were the only evidence identifying respondent. And any decision this Court might render in reviewing the Ohio Supreme Court's Confrontation Clause ruling would have no impact on the admissibility of the disputed evidence.

JURISDICTION

The State alleges that this Court has jurisdiction under 28 U.S.C § 1257, asserting that "[t]he Supreme Court of Ohio's decision qualifies as a

'[f]inal judgment or decree[]' within the meaning of that statute. *Id.; see Michigan v. Bryant*, 131 U.S. 1143, 1151-52 (2011) (granting review when state supreme court found Confrontation Clause violation and remanded for a new trial); *see also Kansas v. Marsh*, 548 U.S. 163, 168 (2006); *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984).

In order to discharge his duties (through his counsel, as an officer of the Court) under Rule 15.2, respondent notes that this Court's jurisdiction under § 1257 depends upon this Court's assessment of Ohio Rev. Code Ann. § 2945.67(A), which the State has not addressed. That statute permits the State to appeal any issue following trial, other than the verdict itself, by leave of the court, in order to secure a ruling on a legal issue with which it disagrees, even if the resolution of that appeal will have no effect on the outcome of the case in which it was rendered. Ohio Rev. Code Ann. § 2945.67(A) (West 2014); *State v. Bistricky*, 555 N.E.2d 644 (Ohio 1990).

This procedure allows the State to obtain a "later review of the federal issue," *Marsh*, 548 U.S. at 168, by a post-acquittal appeal, albeit it not to recharge the respondent if it should prevail. In finding jurisdiction under § 1257, this Court in *Marsh*, 548 U.S. at 168, and *Quarles*, 467 U.S. at 651 n.1, relied specifically on the unavailability of any further appellate review. Further, this Court would have jurisdiction to hear a federal issue resolved under the Ohio procedure allowing such advisory opinions. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-18 (1989); *Camreta v. Greene*, 131 S. Ct. 2020,

2028-31 (2011) (holding that certiorari jurisdiction existed to review constitutional claim even though it would not affect outcome of the case).

STATEMENT OF THE CASE

The State seeks review of the reversal of respondent's conviction for assault and child endangerment, in which the "only direct evidence" implicating respondent as the perpetrator was the hearsay statements of a child deemed incompetent to testify at trial, Pet. App. 68a. The petition asks this Court to review the Ohio Supreme Court's application of the Confrontation Clause to exclude statements by the child that are practically indistinguishable from the child's other statements that the Ohio Court of Appeals found too unreliable to be admitted under State hearsay rules.

1. From 2008 to 2010, respondent Darius Clark, then 23 years old, lived with 24-year-old Taheim T., L.P., and A.T. Pet. App. 3a. Taheim, who had lost custody of three other children, Tr. 526, periodically traveled to Washington, D.C. to work as a prostitute, leaving L.P. and A.T. in respondent's care. Tr. 534-37.

On March 16, 2010, L.P.'s teachers noticed no injuries on him when Taheim picked him up from school around 4:00 p.m. Tr. 239, 281-82. No witness except Taheim said that they saw the children thereafter, prior to L.P.'s arrival at school the next day, Tr. 260-61, 424-25, 455. Meanwhile, at midnight on March 16, Taheim left Ohio and did not return until she was

extradited five months later on charges of assault and domestic violence against her children. Tr. 548-49, 562, 570, 582.

On March 17, after respondent left L.P. at school, L.P. seemed "quiet" but did not complain of pain. Tr. 255-57. L.P.'s teacher, Ramona Whitley, noticed, however, that his eye was red, and when she asked him "what happened," he said he had fallen. Tr. 236-37. When she inquired how he had "fall[en] and hurt [his] face," he repeated, "I fell down." *Id.* Later that day, she noticed under better lighting that the marks on his face appeared more serious than they had previously, and alerted her co-teacher, Debra Jones. *Id.* The two teachers took L.P. aside, away from other children, and questioned him. Tr. 257. When Whitley asked L.P. "who did this," he responded, first, that he "fell"; second, using a nickname for respondent, that "Dee did it"; and finally, "I don't know." Tr. 259, 264. Jones also asked, "Who did this? What happened to you?"; she reported that a "bewildered" L.P. responded, "Dee, Dee." Tr. 272. She further testified that she asked L.P. whether Dee was big or little, and he said "Dee is big." Tr. 278.

Jones took L.P. to the office of her supervisor, who instructed that whoever at the school had first seen L.P. should report his injuries. Tr. 278-79. Whitley, who had received training regarding her mandatory reporting duty, thus called the Cuyahoga County Children and Family Services to report the suspected abuse. Tr. 248, 279. Within three days, she and Jones

also provided statements about their interactions with L.P. to Cleveland Police. Tr. 240, 276-77.

Social worker Howard Little responded to Whitley's call and arrived at the school on the afternoon of March 17. Tr. 625. L.P. first told Little that he had fallen down the stairs, but identified respondent upon re-questioning about his bruises. Tr. 627. When respondent arrived at school at the end of the school day and took L.P. home, he denied knowledge of L.P.'s bruises. Tr. 628-29.

Social worker Sarah Bolog called Taheim on March 18, and Taheim then claimed that L.P. and A.T. were with her. Tr. 471, 474. Later in the day, however, Bolog and her supervisor located L.P and A.T. at respondent's mother's house. Tr. 477-78. At that time, when Bolog's supervisor asked him how he became injured, L.P. named respondent. Tr. 512-13. According to Bolog, L.P. responded in the same way later in the day when asked the same question at the hospital. Tr. 513-14.

Det. Jody Remington met L.P. at the hospital on March 18. When she revealed her badge and asked him who hurt him, he did not answer. Tr. 605-06. She then showed him a photograph of respondent, and L.P. said, "That's Dee." Tr. 607-08. The physician who examined L.P. found that L.P. had "bruising in several stages of development" and "abrasions consistent with having been struck by a linear object," and that A.T. had "bruising, burn marks, a swollen hand, and a pattern of sores at her hairline." Pet. App. 5a.

The physician suspected abuse and estimated the injuries occurred between February 28 and March 18, 2010. *Id.*

Sometime later, L.P. told his grandmother and great-aunt that that respondent caused his and A.T.'s injuries. Tr. 431-32, 460.

The State charged Taheim and respondent with five counts of felonious assault, two counts of child endangering, and two counts of domestic violence, involve her children, L.P., age three, and A.T., age two. Tr. 531; Pet. App. 53a. Taheim, facing up to 40 years in prison, agreed to testify against respondent and to plead guilty to three charges. Tr. 570. The State dropped all other charges against her.

Following a pretrial hearing at which L.P made numerous inconsistent statements about his birthday, his sister's age, the adult living with him, and whether he recalled living with his mother, the trial court found L.P. incompetent to testify. Respondent then made a motion in limine to exclude the testimony of adult witnesses concerning statements that three-year-old L.P. had allegedly made to each of them several months before the trial. Tr. 18-26, 163-66. Notwithstanding the trial court's incompetency finding and the fact that these statements constituted the only evidence identifying respondent as the perpetrator, the trial court denied the motion. Tr. 10-17.

At trial, no one testified to having ever seen respondent strike or otherwise hurt children. *E.g.*, Tr. 585, 670. Taheim's testimony related

largely to denials of her own culpability, *e.g.*, Tr. 549-50, and assertions that respondent occasionally had control of the children when Taheim was absent, *e.g.*, Tr. 543-47. Dorcas Willis, respondent's witness and family friend, testified that she had seen Taheim and her children "20 or more" times, Tr. 669, and that Taheim "whooped that baby [A.T.] a lot," "whipped [L.P.] with the little strap off her purse" over an argument over potato chips, and "spanked him" because "he wouldn't go to sleep," Tr. 670-71.

Nevertheless, presumably based on L.P.'s hearsay statements, which were admitted through a total of seven adult witnesses, the jury found respondent guilty on all but one charge. Tr. 770-73. The court sentenced him to 28 years in prison. Tr. 789-90. Taheim later received a sentence of eight years. Pet. App. 19a.

3. Respondent appealed the conviction to the Eighth District Court of Appeals of Ohio. Among other issues, respondent argued that L.P.'s statements should have been excluded under both the Confrontation Clause and Ohio Rule of Evidence 807, and that the manifest weight of the evidence required the trial court to reverse the conviction, because no credible, admissible evidence supported respondent's guilt. Br. Appellant at 14-24, *State v. Clark*, No. 96207, 2011 WL 6780456 (Ohio Ct. App. Dec. 27, 2011).

The appellate court reversed the conviction on the ground that the testimony of all seven witnesses recounting L.P.'s statements should have been excluded. Pet. App. 52a-73a. The court held that L.P.'s statements to

the police officer, social workers, and teachers were testimonial and violated the Confrontation Clause. Pet. App. 55a-63a. Then, the court excluded L.P.'s statements to his grandmother and great-aunt, because those statements failed two of four prerequisites to admission under Ohio Rule of Evidence 807(A).[1] Pet. App. 63a-69a. First, it found that they "lacked the 'particularized guarantees of trustworthiness'" required by Rule 807(A)(1). *Id.* 68a. Among other factors, it expressed particular concern about how to reconcile the trial court's finding that L.P. was "incompetent to testify" with its finding that "statements L.P. made eight months prior were reliable enough to be admitted at trial." *Id.* Second, the court found that "the only direct evidence" that respondent was the perpetrator was "L.P.'s statements identifying him," and thus that Rule 807(A)(3)'s requirement of "independent proof" was also lacking. *Id.*

4. On appeal to the Ohio Supreme Court, the State accepted the ruling that the statements made to the grandmother and great-aunt were inadmissible under Rule 807. Nor did the State dispute the exclusion of L.P.'s statements to three other witnesses on Confrontation Clause grounds. Instead, the appeal focused entirely on the exclusion under the Confrontation Clause of the child's statements to the teachers. Pet. 6. Respondent argued at length that any decision on the Confrontation Clause issue posed by the State would have no impact on respondent's prosecution, since the Eighth

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[1] Ohio Rule of Evidence 807(A) is reproduced in the Appendix to this document.

District's ruling applying Rule 807 to exclude the testimony by L.P.'s relatives necessarily foreclosed admission of the teachers' statements on the same state law ground. Br. Appellee at 3-4, *State v. Clark*, No. 2012-0215, 999 N.E.2d 592 (Ohio 2013).

The Ohio Supreme Court affirmed. Pet. App. 3a. It found the teachers in this case to have been functioning in part as agents of law enforcement, and on that basis[2] proceeded to apply this Court's primary purpose test first enunciated in *Davis v. Washington*, 547 U.S. 813 (2006). Pet. App. 6a-9a. After carefully examining this Court's guidance in *Crawford v. Washington*, 541 U.S. 36 (2004), *Davis*, and *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), the court applied that test to the facts of this case. Pet. App. 10a-16a. The court noted that L.P. had not "complained about his injuries or needed emergency medical care," and that no other sort of "ongoing emergency existed." *Id.* 15a-16a. The teachers thus proceeded to "separate[] L.P. from other students and in a formal question-and-answer format, they sought facts concerning past criminal activity to identify the person responsible." *Id.* 16a. For these reasons, the court concluded that the primary purpose of the teachers' inquiry was "an information-seeking process to determine what had

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[2] In *State v. Stahl*, 855 N.E. 2d 834, 841-44 (Ohio 2006), the Ohio Supreme Court had previously held that, in determining the testimonial character of witness statements for purposes of the Confrontation Clause, this Court's primary purpose test enunciated in *Davis* is only applicable to statements made to agents of law enforcement. *See* Pet. 9; Pet. App. 25a-26a. The court below's agent-of-law-enforcement finding thus was necessary to justify, and led directly to, its application of the *Davis/Bryant* test enunciated by this Court.

occurred in the past and who had perpetrated the abuse, establishing past events potentially relevant to later criminal prosecution." *Id.* 16a. It thus held that L.P.'s statements to his teachers "should have been excluded pursuant to the Confrontation Clause." *Id.*

The dissent would have reached a contrary outcome. It disagreed with the majority's factual findings, characterizing the questioning as "informal and spontaneous." *Id.* 40a (O'Connor, C.J., dissenting). At the same time, it believed that this Court's primary purpose test was inapplicable under Ohio precedent, because the teachers were not, in its view, agents of law enforcement for Confrontation Clause purposes. Pet. App. 30a, 39a. The dissent thus purported to apply an "objective witness test," *id.* at 30a, which it characterized as different from this Court's primary purpose test. *Id.* 39a-42a. Applying the "objective witness test" to the facts as it characterized them, the dissent found L.P.'s out-of-court statements to the teachers to be nontestimonial, and therefore admissible. *Id.* 42a.

REASONS FOR DENYING THE WRIT

I. The Ohio Supreme Court Correctly Followed This Court's Guidance in *Davis* and *Bryant* to Find the Statements Testimonial.

1. In *Davis v. Washington*, 547 U.S. 813, 822 (2006), this Court articulated a fact-intensive test to determine whether "circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal

prosecution," such that resulting statements are testimonial. This contextual inquiry "objectively evaluate[s] the circumstances in which the encounter occurs and the statements and actions of the parties." *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011). The Ohio Supreme Court properly applied that primary purpose test in this case, Pet. App. 16a, to find that the statements were "elicited from a child by a teacher in the absence of an ongoing emergency and for the primary purpose of gathering information of past criminal conduct and identifying the alleged perpetrator of suspected child abuse" and thus were "testimonial in nature in accordance with *Davis* " *Id.* 17a.

To make its determination, the Ohio Supreme Court considered "whether an emergency exist[ed] and [wa]s ongoing" when L.P. was questioned. Pet. App. 14a (quoting *Bryant*, 113 S. Ct. at 1158). As the court noted, there was "no ongoing emergency" at the time of questioning. *Id.* 15a. The child had not "complained about his injuries" and did not "need emergency medical care." *Id.* Unlike in *Bryant*, the interview did not occur under conditions of an ongoing emergency that posed a "potential threat to the public at large." 113 S. Ct. at 1156. Unlike in *Davis*, the interview did not concern "events *as they were actually happening*." 547 U.S. at 827. Instead, as this Court noted, there was "*no* immediate threat to [the] person" of L.P. *Id.* at 830 (emphasis added).

The Ohio Supreme Court also expressly acknowledged that the presence or absence of an emergency is not by itself dispositive of the testimonial character of a statement. Pet. App. 14a (citing *Bryant*, 131 S. Ct. at 1159). It thus examined the broader circumstances surrounding the teachers' interactions with L.P., including "the statements and actions of both the declarant and interrogators," and the "formality" of the questioning. *Id.* 14a-15a. Here, the teachers "immediately suspected child abuse" and conducted questioning to "identify the person responsible." *Id.* 16a. As the court explained, the teachers "separated L.P from other students" and "sought facts concerning past criminal activity" in a "formal question-and-answer format." *Id.* In questioning L.P., the teachers explained, they were "trying to get a better understanding of who it was" that had caused L.P.'s injuries. Trial Tr. 274. Thus, the court reasoned, the teachers elicited statements that "are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." Pet. App. 16a (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009) (internal quotation marks omitted)).

2. In *Bryant*, the Court also explained that "[i]n making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." 131 S.Ct. at 1155. In the present context, the stringent conditions of Ohio's exception for certain hearsay statements by children reflect an understanding that statements elicited

from children in *ex parte* interviews are particularly in need of testing through the "crucible of cross examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004); *see also* Ohio Evidence R. 807; Ohio Evid. R. 807 staff notes (1991); *see also infra* Section III. As this Court has recognized, "children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement." *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663 (2008); *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 338-39 (2009) (Kennedy, J., dissenting) (citing *Maryland v. Craig*, 497 U.S. 836, 869 (1990) (Scalia, J., dissenting) (noting "the value of the confrontation right" in the specific context of "guarding against a child's distorted or coerced recollections")). The threat that a child's statement could lead to a false conviction is especially high because even corroborating proof of the child's injuries through medical evidence "sheds no light on the reliability of the child's allegations regarding the identity of the abuser." *Idaho v. Wright*, 497 U.S. 805, 824 (1990).

Accordingly, this case is much different from one in which a child's hearsay statement satisfies some independent hearsay exception, such as the excited utterance or medical-diagnosis exception. Unlike those exceptions, which are designed to identify statements made or obtained for purposes other than aiding a potential criminal investigation, Ohio's Rule 807 requires no alternative purpose. The Confrontation Clause's objective of preventing

trial by potentially misleading or inaccurate ex parte examinations, *see Crawford*, 541 U.S. at 50-51, thus becomes paramount.

3. The Ohio Supreme Court's careful application of the *Davis/Bryant* primary purpose test is not called into question by either of two critiques advanced by Petitioner's *amici*.

The amicus brief filed by the State Attorneys General acknowledges that the court in fact applied the primary purpose test, AG Amicus Br. at 7, 13, but complains that it applied it in a way that drew "a strict dichotomy," under which, once the court "found that no emergency existed, it necessarily followed that the teachers' primary purpose was to establish past events potentially relevant to a later criminal prosecution." AG Amicus Br. at 13 (inner quotation omitted). To the contrary, the court below expressly recognized, as did this Court in *Bryant*, that the existence of an emergency "is but one factor to consider when determining the primary purpose of an interrogation," and proceeded to discuss more generally the circumstances in which the questioning took place. Pet. App. 14a (citing *Bryant*, 131 S. Ct. at 1159).

In addition, the amicus brief filed by the American Professional Society on the Abuse of Children (APSAC) calls the decision below into question on the ground that it misconceived the purpose of Ohio's mandatory reporting law. APSAC Amicus Br. 4-11. In so arguing, it cites numerous inapposite decisions of this Court, *id.* at 5-6, ostensibly to establish the categorical

proposition that the purpose of mandatory reporter laws is always "to protect children, not to prosecute their abusers," *id.* at 8. Relying on that supposed clear purpose, and on the contention that "legislative purpose can play an important role in determining whether a hearsay statement is testimonial hearsay," *id.*, APSAC claims that the teacher statements here should therefore have been found non-testimonial.

Under this Court's decisions, however, testimonial character of hearsay statements is determined by considering the totality of the circumstances in which specific statements are taken, and not by divining the legislative purposes of a mandatory reporter statute. Even if it were otherwise, there is no single monolithic purpose guiding all mandatory reporting statutes, which are creatures of state law. And here, the Ohio Supreme Court's ruling that the Ohio legislature "*considered identification and prosecution of the perpetrator to be a necessary and appropriate adjunct in providing such protection*," Pet. App. 8a (emphasis in decision below) (quoting *Yates v. Mansfield Bd. of Edn.*, 102 Ohio St. 3d 205, 209 (2004)), is dispositive as to the purposes of Ohio's statute.

II. Petitioner's Claimed Conflict – Over Whether Mandatory Reporter Status Renders All Statements Taken Testimonial – Does Not Exist.

1. Although the Ohio Supreme Court correctly applied this Court's "highly context-dependent" test, Pet. App. 14a (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1158 (2011)), petitioner suggests that it in fact utilized a

fundamentally different legal standard to determine whether the statements in question were testimonial, Pet. 18-23. To that end, petitioner falsely characterizes the court below as applying a simplistic reasoning process in which a questioner's mandatory reporting duty renders virtually all statements to that person testimonial, regardless of the circumstances of questioning or the actions and statements of the parties. Pet. 18-19. *See also* APSAC Amicus Br. at 2-3 (decision below "effectively held that *any* statement in response to a mandatory reporter's question is by definition testimonial hearsay.")

Petitioner's claimed conflict consists of eight cases in which courts found non-testimonial statements made to mandatory reporters. Pet. 18-23. From these opinions, petitioner culls language that "the mere fact of a declarant making a hearsay statement to a mandatory reporter does not make the statement testimonial," Pet. 18 (quoting *People v. Phillips*, 315 P.3d 136, 165 (Colo. App. 2012)). In other words, "'this duty to report, by itself, did not render all statements made by [the child] to [the social worker] testimonial.'" Pet. 20 (alteration in original) (quoting *Seely v. State*, 282 S.W.3d 778, 788 (Ark. 2008)); *see also* Pet. 19-23 (citing similar holdings in *United States v. DeLeon*, 678 F.3d 317, 324 (4th Cir. 2012), *vacated*, 133 S. Ct 2850 (2013); *United States v. Squire*, 72 M.J. 285, 288-89 (C.A.A.F. 2013); *People v. Cage*, 155 P.3d 205, 220 (Cal. 2007); *State v. Spencer*, 169 P.3d 384,

389 (Mont. 2007); *People v. Duhs*, 947 N.E.2d 617, 620 (N.Y. 2011); and *State v. Bella*, 220 P.3d 128, 132-33 (Or. Ct. App. 2009)).

But the Ohio Supreme Court certainly did not find the statements to the teachers to be testimonial simply because they were mandatory reporters. Instead, the court below applied this Court's totality of the circumstances test to the facts of this case before concluding that the statements were testimonial. Pet. App. 15a-16a. Because Ohio law first requires a finding that the questioner "acted as an agent of the police" before an Ohio court may "pursuant to *Davis* employ the primary-purpose test," *State v. Arnold*, 933 N.E.2d 775, 784 (Ohio 2010), the Ohio Supreme Court's analysis began with the question whether teachers here are agents of law enforcement. Pet. App. 6a-9a. Concluding that "[a]t a minimum" the teachers were "act[ing] in a dual capacity as both instructor and as an agent of the state for law-enforcement purposes," the court proceeded to apply this Court's primary-purpose test. *Id.* 15a.

Indeed, in other factual contexts, the Ohio Supreme Court has found statements made to statutory mandatory reporters to be nontestimonial, further demonstrating that a mandatory reporting duty is not the dispositive inquiry under Ohio law. *See State v. Stahl*, 855 N.E.2d 834, 846 (Ohio 2006) (statements made to a nurse practitioner found nontestimonial); *State v. Muttart*, 116 Ohio St.3d 5 (2007) (statements made to a social worker found nontestimonial); *Arnold*, 126 Ohio St.3d 290 (same).

2. Petitioner makes no effort to claim the existence of a conflict between the opinion below and the decision of another court based on their facts and contexts. Nor could petitioner do so, because the "circumstances in which the encounter occur[red] and the statements and actions of the parties" involved in this case, *Bryant*, 131 S. Ct. at 1156, differ sharply from those in cases cited by petitioner as at odds with the Ohio Supreme Court.

Five of the eight cases cited by petitioner involve the wholly dissimilar context of statements made to medical personnel in the course of medical examinations addressing immediate health needs. *See Squire*, 72 M.J. at 286; *Seely*, 282 S.W.3d at 788-90; *Cage*, 155 P.3d at 219-20; *Duhs*, 947 N.E.2d at 618; *Bella*, 220 P.3d at 131-32.

For instance, in *People v. Cage*, the court found that statements made by a 15-year-old to a physician during a medical exam were nontestimonial. 155 P.3d at 207-08. The court observed that the statements at issue came in response to a single question asked by a doctor who then "asked no further questions, but turned his attention to treating the wound." *Id.* at 208. In addition, the court noted that the declarant "needed immediate acute treatment," and that the question asked was necessary to "deal with the immediate medical situation." *Id.* at 218.

So, too, in *Seely*, where a child experiencing pain made nontestimonial statements in response to questions necessary "for the purpose of defining the scope of [a] medical examination." 282 S.W.2d at 789. In stark contrast, the

Ohio Supreme Court noted that the child in this case did not need "urgent medical care" and that "his teachers did not treat the situation as involving an ongoing medical emergency." Pet. App. 9a.

The three nonmedical cases cited by petitioner also differ on their facts. First, in *State v. Spencer*, the court found statements made to a professional counselor nontestimonial. 169 P.3d at 390. Whereas the Ohio Supreme Court noted in this case that the teachers "immediately suspected child abuse" and structured their questioning to identify the perpetrator, Pet. App. 16a, in *Spencer*, the Supreme Court of Montana stressed that the counselor was "unaware that law enforcement awaited the results of her interviews" when the statements were made, 169 P.3d at 389. Moreover, the interview in *Spencer* took place in the counselor's office "while [the counselor] played [with the children] on the floor," and the "initial statements regarding sexual abuse were unexpected and not the product of coaching or leading questions." *Id.* at 389-90. So, too, the *Spencer* court found statements overheard by a foster mother nontestimonial, noting that those statements came "out of the blue" while the children were being tucked into bed, and not in response to questioning. *Id.* at 389. Such spontaneous statements are plainly different from what the Ohio Supreme Court rightly characterized as accusations given in response to "formal question-and-answer" designed to ascertain "facts concerning past criminal activity." Pet. App. 16a.

In *United States v. DeLeon*, the court found statements made by an eight-year-old child to a social worker nontestimonial. 678 F.3d at 326. That court noted, among other facts, that the social worker made "no effort to separate [the child]" from others, that the child "came to the meeting with his family," that the purpose of the meeting was to "develop a written treatment plan," and that there was no evidence that the social worker attempted to "memorialize" the information gathered during the encounter for use in a criminal prosecution. *Id.* at 324-25. None of those facts is true in the instant case.

People v. Phillips, the only case cited by petitioner involving statements to a teacher, is likewise different on its facts. There, the child was not deemed incompetent to testify at trial. 315 P.3d at 157. In contrast to the persistent questioning and formality observed by the Ohio Supreme Court in the instant case, the *Phillips* court noted that "the questioning was informal; the public school employees did not conduct a structured interrogation." *Id.* at 162. The teachers in *Phillips* did not ask persistent or leading questions; instead, they reacted to a child who had made "an outcry about his injuries." *Id.* Moreover, in *Phillips* the "statements and actions of both the interrogator and the declarant" suggested a purpose to "ascertain the extent and cause of [the child's] injuries," *id.*, whereas in this case the Ohio Supreme Court noted that the teachers did not treat the situation as involving any immediate medical need, Pet. App. 9a.

Phillips also is the decision of a Colorado intermediate appellate court reaching a question on which the Supreme Court of Colorado has yet to weigh in. Indeed, in *People v. Moreno*, 160 P.3d 242 (Colo. 2007) (en banc), seemingly the only occasion on which the Supreme Court of Colorado has decided a post-*Crawford* case about the admission of child hearsay, the court found that the admission of a child's statements without the possibility of cross-examination would violate the Confrontation Clause, despite finding the child medically unavailable to testify. *Id.* at 246-47.

3. In addition, Amicus APSAC urges the Court to grant review on the ground that a different conflict exists in the lower courts "regarding the relevance of the child's age in determining whether his or her statements are testimonial." Br. at 18-20. *See also* AG Amicus Br. at 15 (arguing statements were non-testimonial based in part on consideration of the child's age). But this issue of the proper consideration, if any, to be given to a child's age is not one raised in the Petition, or that petitioner claims to have raised in the courts below. As a result, the courts below did not consider the question, and it played no part in the decision below. Particularly when dealing with a state court, certiorari should not be granted to consider arguments never made below.

III. The Decision Below Is Also Not Certworthy Because an Unappealed Portion of the Eighth District Decision Makes Clear That the Child's Hearsay Statements Are Inadmissible in Any Event Under Ohio Rule of Evidence 807.

Respondent was convicted of child abuse without any testimony that he had ever been observed to harm anyone. Because the child was found incompetent to testify after a hearing at which he repeatedly gave inconsistent answers to the same questions, the only evidence identifying respondent as the perpetrator came from seven adults who repeated hearsay statements that the child had allegedly made to them eight months before the trial.

On appeal to the Eighth District Court of Appeals, this hearsay testimony of all seven adults was ruled inadmissible – five on Confrontation Clause grounds and two (L.P.'s grandmother and great-aunt) because they were inadmissible under Ohio Rule of Evidence 807. Pet. App. 68a. In appealing to the Ohio Supreme Court, the State did not even challenge the adverse rulings as to five of the seven witnesses who had offered child hearsay evidence at trial. This left standing – and still leaves as the law of the case – the Eighth District's Rule 807 ruling. *See Pipe Fitters Union Local No. 392 v. Kokosing Constr. Co.*, 690 N.E.2d 515, 518-19 (Ohio 1988) ("[L]aw of the case precludes a litigant from attempting to rely on new arguments on retrial which could have been pursued in a first appeal."); *see also Nolan v. Nolan*, 462 N.E.2d 410, 412 (Ohio 1984).

Ohio Rule of Evidence 807 is a "tender-years" statute, similar to those enacted by many states, which create special and more forgiving rules for the admission of hearsay statements by children in connection with sexual and

physical abuse that the child may have suffered. But the ability to invoke Rule 807 turns on satisfying its special requirements, including showing 1) "particularized guarantees of trustworthiness" when the facts are viewed under "the totality of the circumstances;" 2) the "unobtainab[ility]" of the child's testimony; and 3) the existence of "independent proof" of the harm at issue. *See* Rule 807(A)(1), (2),(3) in Appendix A.

In finding the hearsay statements by L.P.'s relatives to be inadmissible, the Eighth District focused first on the State's failure to "establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement." Ohio Evid. R. 807(A)(1). The appellate court was "concerned with reconciling the court's finding L.P. incompetent to testify in November of 2010 with the court's finding that the statements L.P. made eight months prior were reliable enough to be admitted at trial." Pet. App. 68a. Thus, L.P.'s many conflicting statements at the competency hearing (Trial Tr. 10-17) were seen to undermine the reliability of his earlier statements to the witnesses. Ohio Evid. R. 807(A)(1).

In concluding that the first prong of Rule 807 demanding "guarantees of trustworthiness" was not met, the court also evaluated each factor prescribed by the rule, including the statements' "spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a

child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement." Ohio Evid. R. 807(A)(1); Pet. App. 64a. The court noted that L.P.'s references to the cause of his injuries were inconsistent, and that his mental state was "unstable," *id.* 66a. The appellate court also specifically recognized that L.P.'s statements to his teachers "were made in response to investigative questions asked by adults," further indicating their unreliability. *Id.*

In addition to the unreliability of L.P.'s statements, the Eighth District found the statements to the relatives had to be excluded on the distinct ground that Rule 807(A)(3) requires independent proof. The appellate court ruled that the issue which required independent proof was "not whether the abuse occurred" but "[w]ho abused L.P.," Pet. App. 67a, and further that "the only direct evidence that defendant was the perpetrator was L.P.'s statements identifying him," *id.* 68a.

The Eighth District's decision applying Rule 807 has been completely ignored by petitioner since it was rendered. Not only did petitioner fail to appeal the ruling, leaving it now as the law of the case, but petitioner has also offered no explanation as to why the reasoning of the Eighth District is any less applicable as a ground for excluding the statements made to the teachers. Indeed, in both particulars – the absence of indicia of trustworthiness and of independent evidence – the Eighth District's Rule 807 reasoning is directly applicable to the testimony of the teachers. The Eighth

District relied heavily on the inconsistencies in L.P.'s responses to the teachers, and the fact that they "were made in response to investigative questions asked by adults," as a ground undermining the reliability of L.P.'s responses in general. Pet. App. 66a. And there is certainly no doubt now, with Petitioner not even disputing the proper exclusion of the other five witnesses, that the testimony of the teachers would be literally the only evidence identifying respondent as the perpetrator.

Accordingly, under the reasoning of the Eighth District Court of Appeals decision below, it is quite clear that the hearsay statements of L.P. made to the teachers, which were excluded under the Confrontation Clause by the decision of the Ohio Supreme Court, are inadmissible in any event under the Rule 807. Thus any decision made by this Court on the issues pressed in the petition would not be outcome determinative, since the evidence is not even admissible under state evidentiary rules.

It is well established that "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Ashwander v. T.V.A.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & Phila. Steamship Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)). "[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)). This

Court should thus deny certiorari and thereby decline the invitation to reach a constitutional question that would have no impact on the admissibility of L.P.'s statements.

Obviously, given that the applicability of the Confrontation Clause in the context of child abuse is a frequently recurring issue, this Court will have ample opportunity to address these issues should it wish to do so in an appropriate case. But it is further notable that even the State of Ohio has ample opportunity for further review in future cases that may be resolved in trial courts by relying on the decision below. The State would have two avenues to challenge an exclusion of statements resting solely on Confrontation Clause grounds. First, under Ohio Rule of Criminal Procedure 12(K), the State could take an interlocutory appeal from suppression if it certifies that it cannot go forward without the suppressed evidence. Alternatively, the State could appeal, after an acquittal, any issue other than the verdict itself, by leave of the court, in order to secure a ruling on a legal issue with which it disagrees, even if the resolution of that appeal will have no effect on the outcome of the case in which it was rendered, Ohio Rev. Code Ann. § 2945.67(A) (West 2014). And this Court would have certiorari jurisdiction over such an appeal. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-18 (1989); *see also Camreta v. Greene*, 131 S.Ct. 2020, 2028-2031 (2011)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: July 1, 2014

Respectfully submitted,

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APPENDIX A

Ohio Rule of Evidence 807 Section A

(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid.R. 802 if all of the following apply:

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

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REPLY BRIEF

No. 13-1352

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF FOR THE PETITIONER

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The Ohio Supreme Court's decision below held, as a matter of *federal* law, that the admission of a child-abuse victim's statements to his teachers violated the Confrontation Clause. The Petition showed that the Court should review this decision for four reasons. *First*, this case provides an opportunity to address a question that the Court's prior cases have left open: When, if ever, do statements to individuals who are not law enforcement qualify as "testimonial"? *See Michigan v. Bryant*, 131 S. Ct. 1143, 1155 n.3 (2011); *Davis v. Washington*, 547 U.S. 813, 823 n.2 (2006). *Second*, as the dissent below explained, the decision conflicts with many appellate cases rejecting the notion that statements qualify as testimonial when they are made to individuals who have a mandatory duty to report child abuse. *Third*, this case raises an important and recurring question, as all 50 States have mandatory-reporting statutes and child abuse remains tragically pervasive. *Fourth*, this case provides a good vehicle to consider these questions because the Ohio Supreme Court's decision rested exclusively on federal law, and the police were not involved in the teachers' conversation with the victim.

Darius Clark's Brief in Opposition fails to rebut these reasons for the Court to grant certiorari.

I. CLARK CANNOT DISPUTE THAT THE DECISION BELOW IS "FINAL" UNDER § 1257

The Supreme Court of Ohio's decision qualifies as "final" under 28 U.S.C. § 1257. *See Bryant*, 131 S. Ct. at 1150-52. Clark does not argue that this Court lacks jurisdiction, but does ambiguously hint (at 3) that the "finality" necessary for jurisdiction under § 1257 may be lacking. That is mistaken.

It is treatise law that state decisions suppressing criminal evidence are "final" under § 1257. *See* 16B Charles Alan Wright, Arthur Miller & Edward Cooper, Federal Practice & Procedure § 4010, at 241 (3d ed. 2012) ("The [*California v. Stewart*, 384 U.S. 436 (1966)] case has established the finality of state decisions suppressing evidence in criminal trials so firmly that most decisions do not even pause to remark on finality." (collecting cases)); *see also California v. Trombetta*, 467 U.S. 479, 483 n.4 (1984) (noting that "a judgment affirming a suppression order . . is reviewable in this Court under 28 U.S.C. § 1257(3)."). This rule applies here. The Ohio Supreme Court affirmed a decision ordering that the evidence at issue be excluded on retrial. Pet. App. 17a, 63a. If Clark is acquitted, the State will be barred from appealing the judgment. *See State v. Lomax*, 774 N.E.2d 249, 254 (Ohio 2002). If Clark is convicted, the question will be mooted. *See New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984).

Despite all of this, Clark cites (at 3) Ohio Revised Code § 2945.67(A) and *State v. Bistricky*, 555 N.E.2d 644 (Ohio 1990), for the proposition that the State may be able to appeal by leave of court after a trial. But that statute and case do not detract from the finality of the decision under § 1257. Notably, in *In re M.M.*, 987 N.E.2d 652 (Ohio 2013), the court held that the State could *not* rely on the statute to appeal a trial court's exclusion of a child-abuse victim's statements after a final judgment. *Id.* at 661. This Petition thus provides the sole opportunity for the State to challenge the Confrontation Clause holding below in this Court.

In sum, this case fits squarely within the third set of cases identified in *Cox Broadcasting Corp. v Cohn*, 420 U.S. 469 (1975)—those in which "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. Accordingly, the decision below is "final" under § 1257.

II. CLARK'S RELIANCE ON *DAVIS* AND *BRYANT* CONFIRMS THE NEED FOR REVIEW

On the merits, Clark argues (at 11-16) that the decision below represents a fact-bound application of the primary-purpose test this Court announced in *Davis* and applied in *Bryant*. Clark can make this "fact-bound" argument only by assuming the answer to the legal issues that this case presents.

First, Clark's assumption that the primary-purpose test applies here is misplaced. This case asks whether statements by children to non-law enforcement *ever* qualify as testimonial. As the dissent below recounted, the Court "has yet to decide under what circumstances statements are testimonial when they are made to someone other than law-enforcement." Pet. App 25a; *see Davis*, 547 U.S. at 823 n.2 (declining to address "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'"); *see also Bryant*, 131 S. Ct. at 1155 n.3 (stating that there was "no need to decide that question" concerning statements to non-law enforcement); *id.* at 1169 n.1 (Scalia, J., dissenting) ("I remain agnostic about whether and when statements to nonstate actors are testimonial."). It is thus no answer for Clark to say that the Ohio Supreme Court merely engaged in a fact-bound

application of the primary-purpose test when the Petition asks whether that test should apply *at all*.

It is also notable that Clark's assumption that the primary-purpose test applies here overlooks strong contrary evidence. As a matter of history, "eighteenth-century treatises assumed that when children were too young to testify, and thus unavailable, their hearsay was admissible in child rape and assault prosecutions." Thomas D. Lyon and Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post*-Davis, 82 Ind. L.J. 1029, 1038 (2007). As a matter of precedent, courts have cited this Court's disclaimers about statements to non-law enforcement when finding that statements to private individuals might be largely exempt. *See, e.g.*, *State v. Franklin*, 308 S.W.3d 799, 816 (Tenn. 2010) (noting that "some courts have categorically held that statements between private parties—or, at least, specific types of such statements—are not testimonial," but resolving the case on narrower grounds).

Second, even if the Court holds that the Confrontation Clause sometimes applies to statements to non-law enforcement, Clark mistakenly assumes that the Court would incorporate the primary-purpose test *wholesale*. Courts, for example, have analyzed statements to non-law enforcement under a modified test, one that treats those statements as "presumptively nontestimonial." *See, e.g.*, *Seely v. State*, 282 S.W.3d 778, 787 (Ark. 2008). Indeed, the Ohio Supreme Court itself applies a relaxed "objective-witness test" to statements made to non-law enforcement, *see* Pet. App. 30a, which is why the major-

ity and dissent vigorously disputed whether the teachers here were law enforcement.

At day's end, Clark's argument that the decision below rests on a fact-bound application of *Davis* and *Bryant* misses the point; it assumes the answer to the important legal questions that this case presents.

III. CLARK CANNOT RECONCILE THE DECISION BELOW WITH MANY SIMILAR CASES FROM OTHER JURISDICTIONS

Clark next tries to downplay (at 16-22) what the dissent below recognized to be a significant conflict with other appellate cases. *See* Pet. App. 37a-39a. His two attempts to reconcile these cases fall flat.

First, Clark claims (at 16-18) that the Ohio Supreme Court's conclusion that the statements to the teachers were testimonial did not rest *entirely* on its preliminary holding that the mandatory-reporting statute made the teachers law-enforcement agents, because the court went on to apply the primary-purpose test after reaching that conclusion. *See* Pet. App. 6a-16a. But Clark does not attempt to dispute the split over whether individuals subject to a mandatory-reporting duty should be viewed as law enforcement or non-law enforcement. And this split is important in these courts because, as noted, the distinction between law enforcement and non-law enforcement often determines the applicable test—whether *Davis*'s primary-purpose test (for statements to law enforcement) or some reduced standard (for statements to non-law enforcement). *Seely*, 282 S.W.3d at 787 (concluding "that a more appropriate test should recognize the distinction between state-

ments to government officials and statements to nonofficials"); Pet. App. 30a.

The decision below adopted the bright-line rule that a teacher subject to the mandatory-reporting statute "act[s] as an agent of the state for purposes of law enforcement." Pet. App. 3a. Other courts reject this legal rule. *See, e.g.*, *People v. Cage*, 155 P.3d 205, 220 (Cal. 2007) (holding that "[t]he mere fact that doctors must report abuse" does not "transform them into *investigative agents* of law enforcement"); *State v. Spencer*, 169 P.3d 384, 389 (Mont. 2007) (finding "no indication that the Legislature intended to deputize this litany of professionals and individuals into law enforcement"); *United States v. Squire*, 72 M.J. 285, 289 (C.A.A.F. 2013) (declining to "'deputize [the] litany of [reporters] into law enforcement'" (citation omitted)).

Second, Clark claims (at 19-22) that this mandatory-reporting debate is much ado about nothing because the State's cited decisions are all reconcilable on their facts. To the contrary, the conflict is made more apparent, not less so, by his factual discussion.

On the one hand, the decision below emphasized the role that the mandatory-reporting statute played in its *ultimate* conclusion that the primary purpose of the teachers' questioning was to investigate crime. It conceded that the teachers acted in a "dual capacity" when speaking with the child—both as instructors and as law-enforcement agents. Pet. App. 15a. But it was the mandatory-reporting duty that tipped the scales to the law-enforcement side: The court stressed that the teachers "acted to fulfill their duties to report abuse," Pet. App. 15a, as the *main* rea-

son for its conclusion that they spoke with the victim primarily to "establish[] past events potentially relevant to later criminal prosecution" rather than to ensure the victim's classroom safety, Pet. App. 15a-16a.

On the other hand, the majority of "[c]ases in other jurisdictions with similar facts have held the child-victim's statements to be nontestimonial." *State v. Ladner*, 644 S.E.2d 684, 690 (S.C. 2007). Like the Ohio Supreme Court, many of these cases recognize the dual capacity with which mandatory reporters operate, but reach the opposite conclusion on which of the dual roles is the "primary" one.

Take the Arkansas Supreme Court's decision in *Seeley*. There, the court recognized that the social worker was a mandatory reporter and that she "would have anticipated during her interview with [the child] that the information she gathered might be used in a subsequent prosecution." 282 S.W.3d at 789. But it found the questioning non-testimonial because it concerned the treatment of the child, which "included ensuring her continued safety" by identifying "anyone who may have harmed her." *Id.* Contrary to Clark's claim (at 19-20), the same conclusion could have been reached here.

Or consider the Montana Supreme Court's *Spencer* decision. There, foster parents suspected child abuse; a physician confirmed the abuse; and a professional counselor began seeing the child. 169 P.3d at 387. The child made statements to the counselor implicating her biological father. *Id.* Clark says (at 20) this case is different because those statements "were unexpected and not the product of coaching or leading questions." *Id.* at 389. But here, too, the

teachers did not use coaching or leading questions to implicate Clark, and, unlike in *Spencer*, their conversation was *not* the result of a medical referral tied to child-abuse concerns. Nor did the teachers even know of child abuse; they asked whether "Dee" was big or little because they thought another student might have bullied the victim. Pet. App. 20a-21a.

No better is Clark's distinction of *United States v. DeLeon*, 678 F.3d 317 (4th Cir. 2012). There, a social worker testified about statements a child told her after he had been referred by a teacher who had noticed abuse. *Id.* at 320-21. The best that Clark can come up with to distinguish this case is that (at 21) the social worker made "no effort to separate [the child]" from others or to "memorialize" the encounter. But that mirrors what happened here, where the victim's teachers spoke with him in the lunchroom and classroom (not in a private office), and did not transcribe everything the child said to them. Pet. App. 20a-21a, 40a.

Similarly, many of Clark's statements (at 21-22) about *People v. Phillips*, 315 P.3d 136 (Colo. Ct. App. 2012), could have just as easily been made about this case. The questions here were "informal and spontaneous," and were asked "to protect [the victim]." *Compare* Opp. at 21 *with* Pet. App. 40a. Clark's contrary claims are belied by the record. The question "Whoa, what happened?," Pet. App. 20a, is one that any adult would ask upon encountering an injured child; it is a far cry from the formalities of a police interrogation. And, as in *Phillips*, after investigation, the child received medical treatment. Pet. App. 21a. Finally, this case is nothing like the other Colo-

rado case that Clark cites. *People v. Moreno*, 160 P.3d 242, 246 (Colo. 2007) (state conceded statements to police were testimonial, but relied on forfeiture arguments).

In sum, the decision below is irreconcilable with the reasoning in, and ultimate outcomes of, many other appellate cases.

IV. CLARK'S CLAIMS OF VEHICLE FLAWS CONFLICT WITH BLACK-LETTER LAW

Clark lastly argues (at 23-27) that the Court should deny the Petition because the child's statements to his teachers would be inadmissible on alternative state-law grounds under Ohio Rule of Evidence 807. This argument fails.

Most notably, Clark cannot dispute that the decision below rested *entirely* on federal constitutional law, *not* on the state-law grounds he raises. The federal basis for the decision is perhaps the only thing on which the majority and dissent agreed. *Compare* Pet. App. 17a (noting that the "majority decision supports a basis constitutional right guaranteed to all accused of crime by the Sixth Amendment of the United States Constitution"), *with* Pet. App. 18a (stating that the majority was "wrong as a matter of federal constitutional law"). The majority cited only cases from this Court or state cases applying this Court's decisions. At no point does it discuss state law. The dissent is even clearer. It states that "the state-law evidentiary issue is not before us." Pet. App. 46a.

In addition, Clark claims (at 25) that the State has "ignored" the decision of the intermediate appel-

late court on this state-law question. To the contrary, that court considered the state-law question only with respect to *different* statements by the child that are not at issue. *See* Pet. App. 63a-64a. The child's statements to his teachers—the statements that were considered by the Ohio Supreme Court and that are at issue now—were *not* rejected on state-law grounds by the Ohio Supreme Court or by the intermediate appellate court. *See* Pet. App. 63a.

Nor is it obvious that the Ohio Supreme Court would rule, on remand, that the child's statements to his teachers should be excluded under state law. With respect to the child's other statements, Clark notes (at 24) that the intermediate appellate court had difficulty reconciling the trial court's incompetency finding with its admissibility finding. But the Ohio Supreme Court has expressly disavowed the rule that children must be found competent for their hearsay to be admissible. *See State v. Silverman*, 906 N.E.2d 427, 432 (Ohio 2009) (citing *State v. C.J.*, 63 P.3d 765, 770 (Wash. 2003)); *cf. Idaho v. Wright*, 497 U.S. 805, 825 (1990) (noting, under prior "trustworthiness" test, that "that the Confrontation Clause does not erect a *per se* rule barring the admission of prior statements of a declarant who is unable to communicate to the jury").

Regardless, this whole state-law debate is academic. Time and again, the Court has said that the "possibility that the state court might have reached the same conclusion if it had decided [a] question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal

question." *United Air Lines v. Mahin*, 410 U.S. 623, 630-31 (1973); *see City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 242 (1983); *Orr v. Orr*, 440 U.S. 268, 276-77 (1979); *Beecher v. Alabama*, 389 U.S. 35, 37 n.3 (1967); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 197 n.1 (1944); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938). "The state court, in other words, has freedom of choice in formulating its grounds of decision, and its choice of federal grounds cannot be undone by speculation as to other choices that might have been made." E. Gressman, K. Geller, S. Shapiro, T. Bishop, E. Hartnett, Supreme Court Practice 211 (9th ed. 2007).

Another Ohio case is instructive. In *Ohio v. Robinette*, 519 U.S. 33 (1996), the Court reviewed a Fourth Amendment question even though it was unclear whether the Ohio Supreme Court's decision rested on federal law or on the State's equivalent Fourth Amendment. *Id.* at 36-37. The Court noted: "[W]hen 'a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.'" *Id.* at 37 (citation omitted). After resolving the federal issue, the Court remanded for the Ohio Supreme Court to consider the state-law one. *See State v. Robinette*, 685 N.E.2d 762, 766 (Ohio 1997).

Clark has failed to show why that same two step is improper here. *Coleman v. Thompson*, 501 U.S.

722 (1991)—the only decision on which he relies for this point (at 26)—is not to the contrary. In that case, the relevant state decision rested *entirely* on *state-law* grounds. *See id.* at 740. The opposite is true in this case—where the state courts resolved the admission issue *exclusively* under federal law. And the state courts' resolution of that federal issue has excluded the admission of what Clark now claims (at 26) to "be literally the only evidence identifying [him] as the perpetrator." His own allegations show the compelling need for review.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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On Petition for Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF *AMICUS CURIAE* AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE* [1]

The American Professional Society on the Abuse of Children is the leading national organization supporting professionals who serve children and families affected by child maltreatment and violence. As a multidisciplinary group of professions, APSAC achieves its mission in a number of ways, most notably through expert training and educational activities, policy leadership and collaboration, and consultation that emphasizes theoretically sound, evidence-based principles.

APSAC is a 26-year-old organization that has played a central role in the development of professional guidelines addressing child abuse and neglect, and as such is well-qualified to help inform this Court about the current nature of child abuse and the manner in which society acts to prevent and mitigate that abuse. APSAC is submitting this amicus brief to assist the Court in understanding the child-protection role served by mandatory reporters such as teachers, social workers, doctors, and other members of society. A proper understanding of the roles and duties of these individuals reveals that child protection is their primary purpose in working with victims of child abuse.[2]

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation or submission of this brief. All of the parties have consented to this filing in letters that have been filed with the Clerk of the Court.

[2] Amicus curiae acknowledges the assistance and contributions of Thomas D. Lyon, J.D., Ph.D., Judge Edward J. and Ruey L. Guiardo Chair in Law and Psychology, University of Southern California; and the assistance of Jessica Culpepper, a member of the University of Southern California Law School Class of 2014;

SUMMARY OF ARGUMENT

Child abuse is an all-too-common problem in contemporary society. To protect children, states have adopted statutes requiring certain members of society —such as doctors, teachers, social workers, and in some cases even lawyers—to report suspected child abuse to appropriate local child-welfare agencies (referred to throughout this brief as CPS, or child protective services).

This case involves a conversation between two of these mandatory reporters (a pair of pre-school teachers) and a three-year old child who exhibited signs of potential child abuse, including bloodshot eyes and red marks on his face that looked "like whips of some sort . . ." Pet. App. 2a, 4a. According to the Ohio Supreme Court, the conversation between the teachers and the young child occurred for the purpose of obtaining testimony to be used to identify and prosecute the child's abuser. *Id.* at 9a, 15a-16a. Based on this premise, the court concluded that the child's statements to the teachers constituted testimonial hearsay. *Id.* at 15a-17a. Because the child was deemed incompetent to testify at trial, the crucial evidence linking the defendant to the crime is now missing. *Id.* at 5a.

The Ohio Supreme Court's ruling exacerbates a pair of splits among the lower courts. *First*, the court viewed the teachers as "agents of the state for law-enforcement purposes" because they are required under Ohio law to report suspected child abuse to the local CPS agency, and effectively held that *any*

Sam Brown and Trey Chiriboga, members of the University of Southern California Law School Class of 2015; and Jodie Liu, a member of the Harvard Law School Class of 2015.

statement in response to a mandatory reporter's question is by definition testimonial hearsay. *Id.* at 6a-9a, 15a-16a. The court failed to recognize (as other courts have) that, viewed objectively, a teacher's (or other mandatory reporter's) primary purpose in questioning a child abuse victim is to *protect* the child rather than *prosecute* the perpetrator.

Second, the court entirely ignored the fact that the victim was a three-year-old child. *See* Pet. App. 1a-17a. Courts are divided over whether a child declarant's age is a relevant consideration in determining if the child's statement to a mandatory reporter is testimonial hearsay. A proper resolution of this split requires little more than the application of basic child psychology, which teaches that young children typically lack any meaningful understanding that statements to non-law enforcement personnel might be used for purposes of criminal prosecution. In light of *Michigan v. Bryant*'s admonition that courts must "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties," *Michigan v. Bryant*, __ U.S. __, 131 S.Ct. 1143, 1156 (2011), courts cannot ignore a young declarant's age when deciding whether his or her statement is testimonial.

This case presents a strong vehicle for this Court to address either or both of these splits of authority, and to set out the proper framework for analyzing testimonial hearsay in the context of out-of-court statements made to non-law enforcement personnel such as teachers, social workers, and doctors. It is apparent that the Ohio Supreme Court—along with numerous other courts across the country—is in need of clearer guidance on the issue.

Until such guidance is provided, the practical implications of the Ohio Supreme Court's ruling are stark. "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). Children are often unavailable to testify at trial for a variety of reasons, including their failure to satisfy the threshold requirement of testimonial capacity (as occurred here), their psychological fragility resulting from the abuse, *e.g.*, *People v. Stechly*, 870 N.E.2d 333, 341 (Ill. 2007), or, most tragically, their death (whether at the hands of their abuser or some other cause), *e.g.*, *State v. Bentley*, 739 N.W.2d 301 (Iowa 2007). In these situations, the only available evidence may be the child's out-of-court statements to his or her teachers, social workers, or medical providers. Under the Ohio Supreme Court's holding, virtually any statement by the child victim to these individuals, regardless of the circumstances, will be deemed inadmissible testimonial hearsay as a result of Ohio's mandatory reporting statute. Victims will go unprotected and wrongdoers will go unprosecuted. The Confrontation Clause was not meant to insulate entire categories of offenses from prosecution.

ARGUMENT

I. THE PRIMARY PURPOSE OF MANDATORY CHILD ABUSE REPORTING AND INVESTIGATION IS CHILD PROTECTION

A. Child protection occupies a special status in constitutional interpretation

This Court has long recognized the crucial importance of laws meant to protect children, and has taken great pains to protect such laws from attack.

The Court has also long distinguished between laws bearing a *protective* purpose and laws bearing a *prosecutorial* or *punitive* one. The mandatory reporter statute at issue in this case is a classic example of a law aimed at protecting children, who are among the most vulnerable members of society.

This Court has repeatedly recognized that when a state's purpose is to protect children, the Constitution goes far in accommodating that purpose. *See, e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'" (citation omitted)) (freedom of speech); *Ritchie*, 480 U.S. at 60 (noting state's "compelling interest in protecting its child-abuse information" as part of its "efforts to uncover and treat abuse") (Due Process).

The Court has distinguished, as it must here, between laws aimed at protecting child victims and laws aimed at prosecuting or punishing those children's abusers. For instance, the Court has held that parents are not entitled to procedural protections standard to criminal trials (such as the right to appointed counsel and the beyond-a-reasonable-doubt standard of proof) where the state seeks to terminate their right to custody of their children. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982); *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 33 (1981). That conclusion resulted in part because "[t]he purpose of [a] termination proceeding was not 'punitive[,]'" but rather, "its purpose was *protective* of the child's best interests." *Lassiter*, 452 U.S. at 34 (Burger, C.J., concurring).

In other contexts as well, this Court has emphasized the distinction between state action aimed at

protecting child abuse victims and action designed to further the prosecution and punishment of perpetrators. In cases interpreting the scope of the ex post facto and double jeopardy clauses, this Court has held that both a civil commitment statute and a sex offender registration statute were "'designed to protect the public from harm'" rather than to punish sex offenders. *Smith v. Doe*, 538 U.S. 84, 93 (2003) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

The present case involves an issue that the Court has not previously addressed: the intersection between a state's purpose in mandating child abuse reporting to governmental authorities and the proper characterization of statements elicited by mandatory reporters under the Confrontation Clause.

In *Bryant*, the Court emphasized that the "primary purpose" of a conversation is the touchstone for determining whether or not a hearsay statement is testimonial. *Bryant*, 131 S.Ct. at 1155; *see also Davis v. Washington*, 547 U.S. 813, 822 (2006) (a statement is "testimonial when the circumstances objectively indicate that the . primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"). This case provides an opportunity for the Court to address whether children's statements to individuals who are obligated to report their suspicions to others—CPS agencies and the police—should be considered testimonial under the Confrontation Clause.

B. The stated purpose of mandatory child abuse reporting laws is child protection

All fifty states have adopted mandatory reporting statutes requiring certain individuals, particularly

those who come into close or frequent contact with children, to report suspected child abuse to government agencies such as CPS agencies. These laws emphasize the need for child protection and rehabilitation of the family, rather than the potential prosecution and punishment of the abusers. For instance, several states articulate the primary purpose of their mandatory reporting provisions as "protect[ing] children whose health and welfare may be adversely affected" through abuse or neglect. Ala. Code § 26-14-2.[3] Most other states' statutes contain similar language emphasizing the laws' primary purpose of child protection. *See, e.g.*, Cal. Penal Code § 11164(b) ("The intent and purpose of this article is to protect children from abuse and neglect."); N.J. Stat. Ann. § 9:6-8.8 ("The safety of the children served shall be of paramount concern.").

Many state legislatures also intend to "preserve the family life of the parents and children, to the maximum extent possible" without endangering the child. D.C. Code § 4-1321.01.[4] To fulfill this purpose, many states specifically emphasize *rehabilitation* rather than *prosecution* as a goal. These states require

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[3] *See also* Alaska Stat. Ann. § 47.17.010; Conn. Gen. Stat. Ann. § 17a-101; R.I. Gen. Laws Ann. § 40-11-1; Vt. Stat. Ann. tit. 33, § 4911.

[4] *See also* Alaska Stat. Ann. § 47.17.010, Del. Code Ann. tit. 16, § 901; Ga. Code Ann. § 19-7-5; Idaho Code Ann. § 16-1601; 325 Ill. Comp. Stat. 5/2; Iowa Code Ann. § 232.67; Kan. Stat. Ann. § 38-2201; Ky. Rev. Stat. Ann. § 620.010; La. Child. Code Ann. art. 601; Mass. Gen. Laws Ann. ch. 119, § 1; Me. Rev. Stat. tit. 22, § 4003; Minn. Stat. Ann. § 626.556; N.J. Stat. Ann. § 9:6-8.8; Or. Rev. Stat. Ann. § 419B.007; R.I. Gen. Laws Ann. § 40-11-1; Tenn. Code Ann. § 37-1-403; Utah Code Ann. § 62A-4a-401; Vt. Stat. Ann. tit. 33, § 4911; W. Va. Code Ann. § 49-6A-1; Wyo. Stat. Ann. § 14-3-201.

that CPS should, when possible, provide rehabilitative services to a child's parent, guardian, or custodian. *See, e.g.*, Iowa Code Ann. § 232.67 ("It is the purpose [of this provision]. to provide the greatest possible protection to victims or potential victims of abuse" through, among other things, "providing rehabilitative services, where appropriate and whenever possible to abused children and their families which will stabilize the home environment so that the family can remain intact without further danger to the child").[5]

No states specify criminal prosecution and punishment as the *primary* purpose animating the mandatory reporting regime. At most, a small minority of states acknowledge that mandated reporting will facilitate the "prosecution of child maltreatment." *See, e.g.*, Ark. Code Ann. § 12-18-102(6) (one of seven purposes of mandatory reporting statutes is to "[e]ncourage the cooperation of state law enforcement officials, courts, and state agencies in the investigation, assessment, prosecution, and treatment of child maltreatment").

In short, the purpose behind mandatory reporting statutes is to protect children, not to prosecute their abusers. As this Court has previously recognized, legislative purpose can play an important role in determining whether a hearsay statement made pursuant to a legislative scheme is testimonial hearsay. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) ("under Massachusetts law the sole purpose of . affidavits" regarding a forensic analysis of drug chemistry "was to provide 'prima facie evidence . . .'" (quoting Mass. Gen. Laws, ch. 111, §13)).

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[5] *See also* Ind. Code Ann. § 31-33-1-1; Kan. Stat. Ann. § 38-2201; N.Y. Soc. Serv. Law § 411.

C. The practical purpose of mandatory child abuse reporting laws and child abuse investigation is child protection

The fact that mandatory reporting may trigger a criminal investigation, or even lead to criminal charges, does not mean the primary purpose of reporting statutes is always criminal prosecution. The mandatory reporting laws, in fact, have been implemented in a manner that confirms that their primary function is child protection. CPS workers are not agents for the police; rather, the two systems have formed uneasy alliances born of the need to minimize trauma to the child and to maximize child protection. Such cooperation shields children from invasive investigations; it does not transform child-focused CPS agents into an arm of law enforcement.

Private citizens' mandated reports may trigger investigation by CPS and the police. At an early stage of most investigations, investigators conduct a safety assessment intended to identify higher risk situations that require additional resources.[6] Further CPS involvement is typically limited to "dealing with alleged perpetrators who are parents, guardians, or caretakers of the alleged victim." Theodore P. Cross, et al., *Police Involvement in Child Protective Services Investigations: Literature Review and Secondary Data Analysis*, 10 Child Maltreatment 224, 226 (2005) (hereinafter "Cross"). This can include caretakers who have failed to protect the child from abuse by a third

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[6] U.S. Department of Health and Human Services, *National Study of Child Protective Services Systems and Reform Efforts: Review of State CPS Policy*, ch. 4 (April 2003) (surveying state policies regarding risk and safety assessment), *available at* http://aspe.hhs.gov/hsp/cps-status03/state-policy03.

party. Approximately half of the states require child protective services to cross-report to law enforcement bodies when the suspected abuse takes place at the hands of certain individuals outside the child's family. U.S. Department of Health and Human Services, *Cross-Reporting Among Responders to Child Abuse and Neglect: Summary of State Laws* 2 (Jan. 2010) (hereinafter "DHHS"). Law enforcement is also more likely to be notified in cases of alleged sexual abuse and in more serious cases of physical abuse. Nevertheless, most sexual and physical abuse allegations are investigated solely by CPS. Cross, *supra*, at 237 table 2 (CPS were the sole investigators in 72% of physical abuse allegations and 55% of sexual abuse allegations in a large, nationally representative sample of child maltreatment investigations). Even when law enforcement is involved, CPS remains involved in the investigation and response in a non-prosecutorial role. *E.g.*, Ohio Rev. Code Ann. § 2151.421(F)(1) (requiring CPS investigation of referred cases); Mich. Comp. Laws Ann. § 722.628(5) ("Involvement of law enforcement officials under this section does not relieve or prevent the department from proceeding with its investigation or treatment if there is reasonable cause to suspect that the child abuse or neglect was committed by a person responsible for the child's health or welfare.").

Fourteen states require CPS to coordinate their investigations and share information with law enforcement. DHHS, *supra*, at 2. The purpose of coordination is "to minimize the number of times individual children are interviewed" and thus reduce the potential trauma of state intervention. *Id.*; *see, e.g.*, Conn. Gen. Stat. Ann. § 17a-101h (stated goal is to "minimize the number of interviews of any child").

When both CPS and the police investigate child abuse allegations, their goals remain distinct. Indeed, CPS workers argue that the police are excessively punitive in their orientation; police worry that CPS investigation will "tip[] off" the alleged perpetrator before they have a chance to interrogate, or that removal of the children will prompt the perpetrator to obtain legal help and thereafter refuse to cooperate. Cross, *supra*, at 225. Nevertheless, coordination advances the state's interest in child protection, because it improves the quality of CPS investigation and facilitates removal of children when their safety demands it. *Id.* at 229.

Although coordination is also likely to benefit the state's prosecution of the abuser, that does not mean that the primary purpose of investigation (or the reporting that spurs it) is to gather evidence with an eye toward prosecution. "[M]ost substantiated and founded child abuse cases do not lead to prosecution. . . ." Theodore P. Cross, et al., Prosecution of Child Abuse: A Meta-Analysis of Rates of Criminal Justice Decisions, 4 Trauma, Violence, & Abuse 323, 333 (2003).

Hence, coordination between CPS and law enforcement assists the state's efforts to protect children against further abuse more often than it creates evidence for prosecutors. As a practical matter, this fundamental goal of child protection would be undermined if agencies were deterred from pursuing coordination for fear that their efforts would turn evidence gathered during a CPS investigation into testimonial hearsay.

II. THERE IS A CONFLICT AMONG LOWER COURTS REGARDING WHETHER OUT-OF-COURT STATEMENTS BY CHILDREN TO MANDATORY REPORTERS ARE TESTIMONIAL

Lower courts have reached varying conclusions regarding whether children's statements elicited by mandatory reporters are testimonial hearsay. This case raises two particular issues that have divided lower courts: first, whether statements elicited by mandatory reporters are necessarily testimonial, and second, whether the declarant's age plays a meaningful role in determining whether or not an out-of-court statement is testimonial.

To date, this Court has declined to address "'whether and when statements made to someone other than law enforcement personnel are "testimonial."'" *Bryant*, 131 S.Ct. at 1155 n.3 (quoting *Davis*, 547 U.S. at 823 n.2); *see also id.* at 1169 n.1 (Scalia, J., dissenting) ("I remain agnostic about whether and when statements to nonstate actors are testimonial."). In all of this Court's post-*Crawford* decisions finding a statement to be testimonial, the cases have involved statements made directly to law enforcement personnel or provided in response to a direct request from law enforcement. *Bullcoming v. New Mexico*, __ U.S. __, 131 S.Ct. 2705, 2717 (2011) (noting that in both *Bullcoming* and *Melendez-Diaz*, "a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations"); *Davis*, 547 U.S. at 829-32 (interrogation by police resulted in testimonial statements); *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (same).

This case also provides an effective vehicle for the Court to address the status of children's statements to mandatory reporters such as teachers, medical professionals, and social workers—a question that this Court has repeatedly left unanswered. *See, e.g.*, *Bryant*, 131 S.Ct. at 1169 (Scalia, J., dissenting) ("How to assess whether a declarant with diminished capacity bore testimony is a difficult question, and one I do not need to answer today."); *White v. Illinois*, 502 U.S. 346, 364 (1992) (Thomas, J., concurring) (noting the uncertain status under the Confrontation Clause of "the unsuspecting social-services worker who is told of possible child abuse").

A. There is a conflict regarding the extent to which statements made to mandatory reporters are testimonial

Courts are divided regarding the extent to which statements elicited by mandatory reporters are testimonial. Some courts, such as the Ohio Supreme Court in this case, have concluded that any statement made to a mandatory reporter is testimonial. Similarly, some courts have relied on the existence of a mandatory reporting system to support a case-specific conclusion that the declarant's statements to a mandatory reporter were testimonial. Other courts, in contrast, have determined that statements to mandatory reporters are not testimonial in light of the particular circumstances of the interview or exchange at issue in the case.

The Ohio Supreme Court's decision falls into the first category of cases, which hold in effect that any statements to mandatory reporters are testimonial. The court explained that because the victim's "teachers acted to fulfill their duties to report abuse," their questioning was intended "to ascertain facts of

potential criminal activity and identify the person or persons responsible." Pet. App. 15a. As the court identified no other basis for its conclusion, the existence of the mandatory reporting statute was the only conceivable basis on which the court held that the victim's statements to his teachers were testimonial.

The Illinois Supreme Court's plurality opinion in *Stechly* falls into the same category. There, the opinion asserted that the existence of a mandatory reporting statute "substantially buttress[ed]" the conclusion that a child abuse victim's statements to a school social worker and a hospital nurse were testimonial, because those individuals "appear[ed] to have done nothing as a result of taking those statements other than contacting the authorities." *Stechly*, 870 N.E. 2d at 365, 367; *see also State v. Hosty*, 944 So. 2d 255, 266 (Fla. 2006) (Pariente, J., concurring in part and dissenting in part) ("In assessing whether a statement is testimonial, pertinent factors include whether the witness had a duty to report the contents of the statement to a law enforcement agency (as did the teacher in this case).").[7]

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[7] Similarly, in cases involving CPS investigations (rather than mandatory reporters), courts have placed significant emphasis on the CPS agencies' duty to cooperate with law enforcement. *See Bobadilla v. Carlson*, 575 F.3d 785, 793 (8th Cir. 2009) (holding that statements made during a CPS investigation were testimonial despite the CPS agent's child-protection role, because the CPS "statute requires the interview to achieve another purpose akin to a police interrogation: assisting law enforcement with the investigation of a suspected criminal violation"); *Flores v. State*, 120 P.3d 1170, 1179 (Nev. 2005) (holding that a victim's statements to a CPS investigator were testimonial because the

In contrast to these cases, a number of courts have held that a child's statement to a mandatory reporter is not necessarily testimonial. Many of these cases distinguish between *primary* and *secondary* purposes of the interview with the child, and reach the conclusion (consistent with the discussion above in Part I) that non-law enforcement interviews are fundamentally *protective* rather than *prosecutorial* in nature. These courts have held that children's statements to mandatory reporters are not testimonial where the mandatory reporters are acting for a primary purpose other than gathering information to use in a prosecution. *See People v. Duhs*, 947 N.E.2d 617, 620 (N.Y. 2011) ("[I]t is of no moment that the pediatrician may have had a secondary motive for her inquiry, namely, to fulfill her ethical and legal duty, as a mandatory reporter of child abuse, to investigate whether the child was potentially a victim of abuse. Her first and paramount duty was to render medical assistance to an injured child."); *Seely v. State*, 282 S.W.3d 778, 788 (Ark. 2008) (stating that a hospital social worker's "duty to report, by itself, did not render all statements made by [the victim] to her testimonial"); *People v. Cage*, 155 P.3d 205, 220 (Cal. 2007) ("The mere fact that doctors must report abuse they see, suspect, or know of in the course of practice does not transform them into investigative agents of law enforcement."); *State v. Spencer*, 169 P.3d 384, 389 (Mont. 2007) ("we refuse to attach that significance to the duty to report").

In reaching these conclusions, courts have often categorized the purpose of an interview in one of three ways: a primary purpose of obtaining medical

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investigator was "tasked with reporting instances of child abuse for prosecution").

treatment, *e.g.*, *Duhs*, 947 N.E.2d at 620; a primary purpose of responding to an ongoing emergency, *e.g.*, *Commonwealth v. Allshouse*, 36 A.3d 163, 179 (Pa. 2012), *cert. denied*, __ U.S. __, 133 S.Ct. 2336 (2013); and a third category involving all other interactions that do not involve medical treatment or ongoing emergencies, which courts almost reflexively deem to be testimonial (as occurred in this case). A particularly telling example of this tendency can be found in *State v. Maguire*, 78 A.3d 828 (Conn. 2013). In the course of remanding for an evidentiary hearing regarding the circumstances surrounding the child victim's statements during a forensic interview conducted at a child advocacy center, the court admonished the lower court that "a victim's statements during a forensic interview may be deemed nontestimonial *only if* the essential purpose of the interview is to provide medical assistance to the victim." *Id.* at 850 (emphasis added). This narrow focus on medical treatment fails to recognize that non-law enforcement personnel may have a primary purpose other than *either* medical treatment *or* obtaining evidence for use in a prosecution. As this Court emphasized in *Bryant*: "[T]here may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 131 S.Ct. at 1155.

In contrast to the rigid quasi-categorical approach adopted by many courts, a handful of cases have adopted a nuanced approach that is more consistent with the core concerns of this Court's Confrontation Clause precedent. For example, in *State v. Buda*, 949 A.2d 761 (N.J. 2008), a social services employee asked a child abuse victim if anyone had beaten him. *Id.* at 778. The court examined the "proper context" of the

interview and concluded that the employee's questioning was aimed at protecting the child from his suspected abuser, even though the social worker was not providing medical care. *Id.* The court rightly observed that "the primary obligation of a [social services] worker is not to collect evidence of past events to secure the prosecution of an offender, but to protect prospectively a child in need." *Id.* at 778-79. Mandatory reporting is done "*in addition* to her paramount duty to care for the safety of children." *Id.* at 779 (emphasis added).[8]

Given the variety of diverging approaches courts have adopted when addressing children's statements to mandatory reporters, the question presented in this case warrants this Court's attention. Many courts (including the Ohio Supreme Court) have overlooked the fundamentally *protective*, rather than *prosecutorial*, purpose of mandatory reporting statutes, and have accordingly failed to view statements to mandatory reporters in the proper context.

This case presents a particularly suitable vehicle for addressing this question because there is no evidence here that the teachers who elicited the victim's statements were acting at the direction of law enforcement. This case thus avoids the separate and

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[8] *See also, e.g.*, *State v. Spencer*, 169 P.3d 384, 389 (Mont. 2007) (a social worker's interview was done for the primary purpose of "ensuring [the victim's] continued safety," and discerning "the identity of anyone who may have harmed [the victim] was relevant to ensuring her safety after she left the hospital," even though the interviewer "would have anticipated during her interview with [the victim] that the information she gathered might be used in a subsequent prosecution").

difficult question of whether private citizens have been deputized by law enforcement for purposes of the Confrontation Clause.[9] Rather, this case presents a straightforward question: when are statements elicited by non-law enforcement personnel testimonial, and does it matter if the person eliciting the statements is obligated to report suspected child abuse to CPS agencies and/or law enforcement?

B. There is also a split of authority regarding the relevance of the child's age in determining whether his or her statements are testimonial

In addition to the split regarding the correct characterization of statements elicited by mandatory reporters, courts are divided about how to address statements made by very young children (such as the three-year-old victim in this case).

The existence of this disagreement is somewhat surprising given the reality that young children are unlikely to appreciate that their statements to non-law enforcement personnel will be used in future prosecutions of their abusers. Research examining children's developing understanding of the legal system has found that although children as young as four years of age have some familiarity with the police

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[9] *Compare State v. Bentley*, 739 N.W.2d 296, 297 (Iowa 2007) (statement was testimonial where an interview at a Child Protective Center was jointly arranged by law enforcement and CPS, and law enforcement officer observed the interview), *with State v. Krasky*, 736 N.W.2d 636, 639, 641 (Minn. 2007) (statement was non-testimonial where elicited by a nurse practitioner in the presence of law enforcement, where the referral "was a joint decision made by social services and law enforcement").

(whom they view as playing the preeminent role in punishing criminals[10]), they are unfamiliar with other legal professionals and the legal process.[11] As a result, unless children are explicitly told that what they say will be shared with the police, they are unlikely to believe that their statements will lead to criminal punishment.

The lower courts are in conflict over the relevance of a child's age in determining whether his or her statements are testimonial. Some courts have relied on the declarant's young age to support the conclusion that the statement was non-testimonial. *State v. Miller*, 264 P.3d 461, 490 (Kan. 2011); *State v. Vigil*, 127 P.3d 916, 925-26 (Colo. 2006). Other courts have taken the declarant's age into consideration but determined that the statement was nonetheless testimonial. *State v. Justus*, 205 S.W. 3d 872, 880 (Mo. 2006); *People v. Stechly*, 870 N.E.2d 333, 363 (Ill. 2007) (plurality opinion). And, in contrast, yet other courts have held that the declarant's age is entirely *irrelevant* to whether a statement is testimonial. *State v. Snowden*, 867 A.2d 314, 329 (Md. 2005); *State v.*

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[10] Martine B. Powell et al., *Children's Perceptions of the Role of Police: A Qualitative Study*, 10 Int'l J. of Police Science & Mgmt. 464, 470 (2008) (5- to 8-year-old "children predominantly identify policing with the punitive role, such as arresting criminals, shooting guns, killing and hurting people").

[11] Karen Saywitz et al., *Children's Knowledge of Legal Terminology*, 14 Law & Hum. Behav. 523, 528-30 (1990) (most 5-year-olds could define "police" but exhibited little understanding of other legal personnel); Alexia Cooper, Allison R. Wallin, Jodi A. Quas, and Thomas D. Lyon, *Maltreated and Nonmaltreated Children's Knowledge of the Juvenile Dependency Court System*, 15 Child Maltreatment 255, 258 (2010) (65% of 4- to 7-year-olds could give partially correct definition of the police, but overall "knew very little about the legal system").

Bentley, 739 N.W.2d 296, 300 (Iowa 2007); *State v. Siler*, 876 N.E.2d 534, 544 (Ohio 2007).

This disagreement has continued even after *Bryant*. Following a remand for reconsideration in light of *Bryant*, the Pennsylvania Supreme Court found the age of the declarant was pertinent, given *Bryant*'s "requirement that a court consider all of the relevant circumstances when determining whether a declarant's statements are testimonial." *Commonwealth v. Allshouse*, 36 A.3d 163, 181 (Pa. 2012). By contrast, the Connecticut Supreme Court has held that *Bryant* shifted the focus "away from the declarant's intent" and should "further restrict the admissibility of children's hearsay statements in sexual abuse prosecutions." *Maguire*, 78 A.3d at 849-50. And in this case the Ohio Supreme Court placed no weight on the fact that the declarant was three years old. *See* Pet. App. 1a-17a.

The fact that the relevant inquiry is objective, such that one examines how a reasonable declarant would perceive the purpose of the questioning, does not preclude considering the declarant's age. Indeed, this Court recently held that the "objective" question of custody for *Miranda* purposes "can account for th[e] reality" that a reasonable child can be different from a reasonable adult. *J.D.B. v. North Carolina*, __ U.S. __, 131 S.Ct. 2394, 2403 (2011). Because of the declarant's young age, this case provides the Court an excellent opportunity to clarify whether the declarant's age should play a role in determining if his or her statements are testimonial.

CONCLUSION

For the reasons set forth above and in the brief of the Petitioner, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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June 9, 2014

AMICUS CURIAE BRIEF

No. 13-1352

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF *AMICUS CURIAE* DOMESTIC VIOLENCE LEGAL EMPOWERMENT & APPEALS PROJECT (DV LEAP) IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether mandatory reporters of suspected child abuse are agents of law enforcement for purposes of the Confrontation Clause.

Whether a child's out-of-court statements to a teacher in response to questions about the cause of the child's injuries qualify as "testimonial" statements subject to the Confrontation Clause.

INTEREST OF *AMICUS CURIAE*[1]

The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) is committed to combating domestic violence through litigation, legislation, and policy initiatives. DV LEAP has extensive experience working with survivors of domestic violence and engaging in legal and policy reform efforts on their behalf, and has filed seven *amicus curiae* briefs in this Court, including two on confrontation rights.

DV LEAP is concerned that an overly expansive interpretation of the Confrontation Clause could endanger victims of domestic violence, particularly

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice under Rule 37.2(a) of intent to file this brief was provided to the Petitioner and the Respondent, and both have consented in writing to the filing of this brief.

children who are abused. Although the Confrontation Clause confers no rights in civil proceedings, civil courts often apply comparable principles of due process and sometimes even explicitly apply the Confrontation Clause in the context of claims of abuse. DV LEAP therefore fears that the Ohio Supreme Court's decision—which effectively excludes the testimony of mandatory reporters who witness child statements of abuse—will profoundly undermine civil courts' ability to determine whether children are at risk of future abuse.

This issue is directly relevant to many of DV LEAP's clients who have faced setbacks in custody proceedings where they allege abuse. Over the last 16 months, DV LEAP has received assistance requests from 76 mothers in 31 states who have lost custody or had their visitation terminated or significantly limited by courts that rejected their allegations of child abuse by the fathers. DV LEAP believes that these decisions raise significant concerns because they are representative of family courts' widespread wariness of mothers' claims of potential abuse. This underscores the critical role that testimony from a mandatory reporter can serve in protecting an abused child. Therefore, the decision below, if applied in the context of custody or child welfare proceedings, will further endanger the health and welfare of children across the nation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ohio Supreme Court's decision, if left undisturbed, will have significant adverse effects beyond

the criminal courts. Child abuse is frequently an issue in contested custody and child protection cases.[2] When abuse is alleged in a civil context, courts often treat the allegations as quasi-criminal, and some courts explicitly apply the Confrontation Clause in those circumstances. Many courts also apply similar principles as a matter of civil due process.

The issue is critically important—and the danger resulting from the decision below particularly pronounced—in child custody disputes that involve claims of abuse by one parent. In this context, family courts across the country have been skeptical of testimony by one parent against the other because of perceived bias or animosity. In particular, allegations by a mother against a father are frequently discounted or rejected on the assumption that they are designed to gain custody, rather than to protect the child. This troubling trend simply underscores the enormous value that testimony from an independent third party—often a mandatory reporter—can have in protecting the safety of our nation's children. Yet the decision below could, if applied in the civil context, render that testimony inadmissible.

This case therefore presents an issue of exceptional importance to DV LEAP and American families and children that warrants review by this Court.

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[2] We note that child abuse comes up in many contexts, but focus here on the impact of the Ohio Supreme Court's decision on custody and child welfare cases because these cases represent the most common civil court contexts in which the decision is likely to have an impact.

ARGUMENT

I. Criminal Confrontation Rights Doctrine Influences Family Law Cases Where the Protection of Children Is of Paramount Importance

A. Allegations of Domestic Violence and Child Abuse Commonly Arise in Civil Proceedings Designed to Protect Children

Domestic violence, including child abuse, is not just a criminal offense and not every occurrence of intrafamily violence is prosecuted. Allegations of domestic violence or child abuse frequently come up in the context of civil proceedings in family courts. The presence of domestic violence is particularly likely to be an issue in contested custody cases. *See* Judith G. Greenburg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. Ill. U. L. Rev. 403, 411 (2004) ("[C]ases that get to litigation (or even to judicial intervention short of litigation) are exactly those most likely to involve domestic violence."); Janet R. Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families,* 43 Fam. Ct. Rev. 284 (2005) (approximately 75% of contested custody claims have allegations of domestic violence); Peter Jaffe, Michelle Zerweer, and Samantha Poisson, Centre for Children and Families in the Justice System, *Access Denied: The Barriers of Violence and Poverty for Abused Women and their Children After Separation* at 1 (2004) (same).

The legal and functional purpose of these civil proceedings is not to adjudicate an accused's guilt or innocence. Instead, in child custody or child welfare

proceedings, the court's objective is to establish a custody and visitation order that protects the "best interests" of the minor child.

A history of domestic violence or child abuse is thus highly relevant to the outcome of these proceedings. Of course, courts must determine the veracity of alleged abuse in order to properly determine which custody and visitation arrangement might be in the child's best interests. *See* National Council of Juvenile and Family Court Judges, *Domestic Violence As A Factor To Be Considered in Custody/Visitation Determinations* (2003), *available at* http://www.ncjfcj.org/sites/default/files/chart-custody-dv-as-a-factor.pdf (listing state codes requiring the consideration of domestic violence or child abuse in custody and visitation cases).

B. Civil Courts Often Treat Allegations of Abuse as Quasi-Criminal and Are Influenced by Criminal Defendants' Procedural Protections, Including Confrontation Rights

It is well-documented that civil courts have subjected allegations of child abuse to careful scrutiny, especially in the custody or child welfare context. Frequently the net effect is to treat such allegations as requiring a higher level of proof than a normal civil matter. "[G]iven the inflammatory character of a charge of child sexual abuse, as well as the fact that the accused parent's right to maintain a relationship with the child is at stake, the alleging parent's standard of proof [in a civil custody suit], realistically, is more akin to that of a criminal case, requiring proof beyond a reasonable doubt." Meredith Sherman Fahn, *Allegations of Child Sexual Abuse in Cus-*

tody Disputes: Getting to the Truth of the Matter, 14 Women's Rts. L. Rep. 123, 130-31 (1992) (*Getting to the Truth*). *Amici* have observed this phenomenon in their own practice before family courts. *See, e.g.*, *Ferguson v. Wilkins*, Case Nos. DRB757-01 & CPO2261-02 (D.C. Super. Ct. Dec. 15, 2005) (finding, despite child's repeated reports of father's sexual abuse, the absence of coaching by mother, and multiple experts' cautionary opinions, that there was "insufficient evidence to conclude that Mr. Ferguson engaged in inappropriate touching or conduct with his child"), *rev'd*, 928 A.2d 655 (D.C. 2007).

In addition, courts also are surprisingly willing to apply Confrontation Clause principles in civil custody or child welfare proceedings when child abuse is alleged, even though the Confrontation Clause applies only to criminal matters. In fact, Mississippi courts have expressly held that the Sixth Amendment's Confrontation Clause affords *civil* litigants in child custody cases the right to confront witnesses against them. *See In re Interest of C.B.*, 574 So.2d 1369, 1374 (Miss. 1990) ("This is not a criminal case, but we are of the opinion that the right of confrontation should be accorded to an accused parent in such cases as this. The fact that the accusation is a terrible and shameful one ought not blind us to the plight of one who may stand wrongfully accused."); *cf. In re Interest of T.S.*, 732 S.E.2d 541, 542 (Ga. Ct. App. 2012) (relying on Confrontation Clause language from a criminal case to define the right to confrontation in a civil parental termination hearing).

While some courts acknowledge that the Confrontation Clause does not extend to civil cases, they nevertheless conclude that similar rights must be pro-

tected under the Due Process Clause. Such rights include a right to cross-examine witnesses, and are sometimes construed specifically to afford parents a comparable right to confront and cross-examine witnesses testifying against them in civil proceedings that could impact custody or parental access. Georgia, Kentucky, Massachusetts, and Texas courts, among others, have found such a civil right to confrontation rooted in the Due Process Clause. *See, e.g.*, *In re Interest of T.S.*, 732 S.E.2d at 542; *Cabinet for Health and Family Servs. v. A.G.G.*, 190 S.W.3d 338, 345 (Ky. 2006) ("A civil litigant's right of confrontation and cross-examination is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments."); *In re Adoption of Mary*, 610 N.E.2d 898, 901 (Mass. 1993) ("Due process concerns and fundamental fairness require that a parent have an opportunity effectively to rebut adverse allegations concerning child-rearing capabilities."); *Davidson v. Great Nat'l Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987) (emphasizing that longstanding jurisprudential principles demonstrate that "[d]ue process requires an opportunity to confront and cross-examine adverse witnesses"); *In re Interest of S.P.*, 168 S.W.3d 197, 206 (Tex. App. 2005) (citing cases in which courts have held "cross-examination is normally part of the meaningful hearing requirement inherent in principles of due process").

This case therefore not only presents, as Petitioner explains, an issue of exceptional importance for criminal courts, but also an issue that will significantly affect the ability of civil courts to protect children from abuse. As discussed below, the issue is particularly important in custody disputes where parental reports or testimony are often rejected as

manufactured accusations stemming from hostility, making evidence from mandatory reporters potentially critical to protecting an abused child.

II. The Ohio Supreme Court's Decision Threatens to Undermine the Mission of Family Courts to Assure the Best Interests of the Child

A. Courts Routinely Discount Claims Made by One Parental Litigant that the Other Parental Litigant Has Abused the Child

Given the widely-held archetypes of a loving family, nurturing parents, and the innocence and vulnerability of children, acts of intrafamily child abuse, particularly sexual abuse, can seem beyond comprehension. Nonetheless, many children in the United States suffer abuse or neglect at the hand of a parent. *See* Children's Bureau, U.S. Dep't of Health and Human Servs., *Child Maltreatment 2012*, 21-22, *available at* http://www.acf.hhs.gov/programs/cb/resource/child-maltreatment-2012.

Accusations of maltreatment of a child also often and understandably emerge in the context of a divorce proceeding, particularly in connection with custody and visitation determinations. *See* Kathleen Colborn Faller, "Possible Explanations for Child Sexual Abuse in Divorce," 61 Am. J. Orthopsychiatry 86, 87 (1991) (observing, in part, that a divorce may be precipitated by discovery of sexual abuse and that long-standing sexual victimization may be revealed after a separation); Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 Juv. & Fam. Ct. J. 1, 33-34 (1992) ("Abuse of children by batterers may be more likely

when the marriage is dissolving, the couple has separated, and the husband and father is highly committed to continued dominance and control of the mother and children ") (citations omitted).

The adversarial setting of a custody dispute tends to magnify the inherent inclination to disregard, discount, or reject allegations of abhorrent acts when those allegations are made by one litigating parent against the other litigating parent. *See Getting to the Truth* at 123-24; Lundy Bancroft et al., *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* 154 (2d ed. 2012) ("Family courts and child protective services often appear skeptical of domestic violence or child abuse allegations brought by women in custody and visitation litigation, believing that such reports are exaggerated for strategic purposes."). "[B]ecause the [custody] court is hearing only from two warring parents, courts become deaf to mothers' claims that they are advocating for the best interest of their children." Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solution*, 11 Am. U. J. Gender Soc. Pol'y & L. 657, 717 (2003) (*Understanding Judicial Resistance*) ("Many judges' and mental health professionals' resistance to taking seriously a battered mother's claims of risk to children is driven, at least in part, by the fact that she is a litigant with a presumed self-interested bias against the opposing party, which casts doubt on all of her claims about the children's welfare.").

The tendency of courts to discount abuse claims made by one parent against the other may be revealed, for example, when a judge indicates from the

bench that he intends to discredit reports of child maltreatment merely because it was reported "by *the mother*." *See id.* at 665 (describing case in which judge disparaged attorney's allegations of the child's destructive behaviors after visits with the child's father). Even in child protection agencies, this skepticism can be reflected in explicit guidelines urging child welfare personnel to be skeptical of abuse claims if the parents are involved in custody litigation. *See, e.g.*, U.S. Dep't of Health and Human Servs., *Child Protective Services: A Guide for Caseworkers* (2003) at 42, *available at* www.childwelfare.gov/pubs/usermanuals/cps/cps.pdf ("[C]aseworkers should be alert to separated or divorced parents making allegations against each other."). Regardless of printed guidelines, the practice of child welfare workers' discounting of child abuse claims raised in custody litigation is well known. *See* Nancy Thoennes & Jessica Pearson, "Summary of Findings from the Sexual Abuse Allegations Project," *Sexual Abuse Allegations in Custody and Visitation Cases 4* (E. Nicholson ed., A.B.A. Nat'l Legal Resource Ctr. for Child Advoc. & Protection 1988) at 6 (caseworkers are sometimes reluctant to investigate allegations of abuse in custody disputes because they assume the cases are "undoubtedly false").

Even when statutory provisions explicitly take abuse into account in custody determinations, they can perversely lead to judicial skepticism about abuse claims. Virtually every state requires the family court to take into consideration whether there is a history of domestic violence in determining the best interests of the child. Ellen Pence et al., The Battered Women's Justice Project, *Mind the Gap: Accounting for Domestic Abuse in Child Custody Evalu-*

ations at 5 (June 2012). Many state laws actually go further and contain a "rebuttable presumption" that an abusive spouse may not have sole or joint custody of his or her children because of the potential harm (direct and indirect) to their children. *See Understanding Judicial Resistance* at 661-62; *see, e.g.*, D.C. Code sec. 16-914(a)(2) ("There shall be a rebuttable presumption that joint custody is not in the best interest of the child or children if a judicial officer finds by a preponderance of the evidence that an intrafamily offense [has occurred]."). Courts thus may often fear that claims of domestic violence or child abuse by one parent are "incentivized" by these laws—and are therefore suspect.

Skepticism toward allegations of child abuse has been fueled in particular by the controversial pseudoscientific theory of "parental alienation"—which implies that abuse claims made by a mother against a father are merely an attempt to "alienate" the child from the accused parent's affections. The use of "parental alienation" theory to refute abuse claims has been widely discredited. *See, e.g.*, Joan S. Meier, National Online Resource Center on Violence Against Women, *Parental Alienation Syndrome and Parental Alienation: A Research Review* (rev. 2013), *available at* http://www.vawnet.org/Assoc_Files_VAWnet/AR_PASUpdate.pdf; Joyanna Silberg, Ph.D. et al., *Crisis in Family Court: Lessons from Turned Around Cases, Final Report Submitted to the Office of Violence Against Women, Department of Justice* at 12-19 (Sept. 30, 2013) (*Turned Around Cases*).

A recent study considered 27 custody cases involving parental allegations of child abuse initially determined to be false, resulting in an order granting

custody to the alleged abuser. The allegations were later found to be valid and, in a subsequent proceeding, the child was protected from unsafe contact with the abusive parent. In analyzing the factors that caused the incorrect initial determinations, the authors found one significant problem to be that the "[f]amily courts were highly suspicious of mother's motives for being concerned with abuse." *See Turned Around Cases* at 37.

For all of the above reasons, without third-party testimony supporting an abuse allegation, the parental accuser is often perceived as a strategic fabricator and, in the eyes of the court, may be worse off than if she had remained silent. *See, e.g.*, Stephanie Dallam, The Leadership Council on Child Abuse & Interpersonal Violence, *Are "Good Enough" Parents Losing Custody to Abusive Ex-Partners?* (2006), *available at* http://www.leadershipcouncil.org/1/pas/dv.html.

Assertions of abuse also face an uphill battle because most state family courts and many statutes treat the "friendly parent" as the best parent: That is, the parent who is willing to "share" the child is the preferred parent; by contrast, a parent who resists sharing parenting and alleges that the other parent abuses the child is seen as a bad parent. *Getting to the Truth* at 125.

These troubling trends have increasingly put protective parents in a bind: if they report abuse to the court, they face potential loss of custody or disbelief in court; if they fail to report, they can be accused of failing to protect. Their fears in both directions are painfully well-founded. *See* Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 Harv.

Women's L.J. 229 (1996) (describing child welfare agencies' and state courts' application of "failure to protect" doctrine to remove children from battered mothers); Civic Research Institute, *Sexual Assault Report*, Vol. 9, No. 3 (Jan./Feb. 2006) at 44 ("[W]omen who raise abuse allegations have been shown to receive less favorable rulings than those who do not [f]or this reason, some lawyers advise women not to tell courts or mediators about child abuse or domestic abuse because, by doing so, they risk losing custody to the alleged abuser.") (internal citations omitted). One study reports that 63% of mothers in custody/abuse litigation indicated that they eventually stopped reporting abuse of their children (which the children disclosed during visitations after being put in custody of the alleged abusers) for fear that all contact with their children would be terminated by the courts. *See* Geraldine Butts Stahly et al., *Protective Parents Survey Data* (2003), *available at* http://protectiveparents.com/research.html.

Given the family courts' skepticism of protective parents' reports that a child has been victimized by the other parent, independent evidence of child abuse is essential to protecting children in custody and child protection proceedings. The dominant source of such third-party reports is inevitably mandatory reporters—typically a teacher, a doctor, a therapist, or other provider of service to the child.

B. Mandatory Reporters' Accounts of Children's Disclosures of Abuse Are Essential to Keeping Children Safe

When a child discloses his or her own abuse to a mandatory reporter, the reporter's duty to report protects the child's safety. *See, e.g.*, Child Welfare In-

formation Gateway, Children's Bureau, U.S. Dep't of Health and Human Servs., *Mandatory Reporters of Child Abuse and Neglect* (2014), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm. The reporter's duties include disclosing the abuse to law enforcement or an appropriate child protective services agency. *Id.* Absent a child's statements to a trusted independent source, families may lack the evidence necessary to persuade a court or evaluator that the abuse occurred.

Mandatory reporters know key details and may be the only source of "direct" evidence. Children's in-court testimony regarding their own abuse can be difficult to obtain because young children are particularly vulnerable in cross-examination and risk exposure to more trauma when confronting their abuser. *See, e.g.*, David Crump, *Child Victim Testimony, Psychological Trauma, and the Confrontation Clause: What Can the Scientific Literature Tell Us?*, 8 J. C.R. & Econ. Dev. 83 (1992), *available at* http://scholarship.law.stjohns.edu/jcred/vol8/iss1/5.

Children can also be excluded from testifying in civil cases for various reasons, usually related to their age or understanding of courtroom proceedings and the requirements of testifying. But, even if unable to testify in court, young children are often able to give plausible reports of abuse outside of the courtroom. *See, e.g.*, Ind. Dep't of Child Servs., *Child Welfare Policies*, ch. 4, sec. 22, at 4-5 (2012), *available at* http://www.in.gov/dcs/files/4.22_Making_an_Assessment_(Investigation).pdf ("[Y]oung children are able to give plausible and specific descriptions of traumatic situations that would normally be beyond their experience (e.g., sexual acts) and such statements

should be taken seriously."); Iris Blandon-Gitlin and Kathy Pezdek, *Children's Memory in Forensic Contexts: Suggestibility, False Memory and Individual Differences,* CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS, PSYCHOLOGICAL SCIENCE AND THE LAW 57-80 (Bette L. Bottoms et al. eds., 2009). Because statements made to mandatory reporters are usually voluntary and made to an impartial but trusted person in the child's life, these statements have little risk of unreliability.

A statement made by a child to a mandatory reporter is often the only extra-parental source of evidence of abuse. In 2005, over one-half of reports of child maltreatment (61.7 percent) were from professionals who are considered "mandated reporters." *See* American Humane Association, *Child Abuse and Neglect Statistics* (2013), http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/child-abuse-and-neglect-statistics.html. Treating the reports from mandatory reporters as testimonial and therefore inadmissible would hamstring family courts' ability to determine accurately the risk of child abuse in custody and child protection determinations. Mistakes in these determinations are already common. The Leadership Council on Child Abuse and Interpersonal Violence estimates that 58,000 children a year are placed in the custody of an abuser. *See* The Leadership Council on Child Abuse and Interpersonal Violence, *How Many Children Are Court-Ordered into Unsupervised Contact with an Abusive Parent After Divorce?* (2008), *available at* http://leadershipcouncil.org/1/med/PR3.html ("[W]hen courts get involved in determining custody, children are rarely protected from the violent parent. In at least 75% of cases the child is ordered into un-

supervised contact with the alleged abuser. (Research has found results ranging from 56-90%; a conservative estimate is 75%.).") (citations omitted).

Moreover, when courts mistakenly place children with abusers, third-party corroboration of subsequent abuse can also be critical in *correcting* judicial errors. In the "turned around" cases discussed above, corroborating evidence from trusted professionals was critical in the subsequent (corrective) court's decision. "The main reason that [these] cases turned around was because protective parents were able to present evidence of the abuse and back the evidence up with reports by professionals who were able to dispel the misinformation and myths promulgated [in the first proceeding]." *Turned Around Cases* at 42.

This case therefore presents an issue with significance beyond the criminal context. Given that some family courts follow criminal evidentiary standards, the Ohio Supreme Court's decision puts children at significant risk by limiting the scope of available evidence of abuse, thereby making children's legal protection from parental abuse more difficult. This Court should grant the Petition to ensure that the nation's civil courts can still provide the legal protection that vulnerable children require and deserve.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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No. 13-1352

In the Supreme Court of the United States

OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF *AMICUS CURIAE* OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus, The Ohio Prosecuting Attorneys Association ("OPAA"), is a non-profit origination created to assist county prosecuting attorneys in their pursuit of truth, justice, and the promotion of public safety. OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and to serve as legal counsel to county and township authorities. In addition to its advocacy efforts, OPAA provides continuing legal education programs for prosecutors across Ohio.

In *State v. Clark*, the Ohio Supreme Court examined the Confrontation Clause in the context of statements a three–and-a-half-year-old child made to his preschool teacher identifying the individual who abused him.[2] The Court held that a teacher, as mandatory reporter of child abuse, acts as an agent of law enforcement when questioning a child about suspected abuse. In addition, they found that due to the absence of an ongoing emergency, any statements elicited from the child about the abuse are testimonial and inadmissible under *Crawford*.[3]

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[1] No counsel for either party authored this brief in whole or in part. No person or entity aside from the amicus curiae and its members made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of the intent to file this brief under Sup. Ct. R. 37.2. Consent to file has been granted by both parties.

[2] *State v. Clark*, 137 Ohio St.3d 346 (2013).

[3] *Id.*, syllabus, citing *Davis v. Washington*, 547 U.S. 813 (2006).

A review of the Ohio Supreme Court's decision in this case is of substantial interest to OPAA. The organization is comprised of prosecutors from Ohio's eighty-eight counties who deal with the consequences of the *Clark* decision on a daily basis. These prosecutors are on the frontlines combating offenses of violence against children. This decision has stripped those prosecutors of the ability to seek justice for and ensure the safety of the most vulnerable children in Ohio.

Prior to the lower court's decision in this case, prosecutors throughout Ohio relied upon the fact that certain statements, made by child victims, would be admissible against a defendant, even if the child was not found competent to testify at trial.[4] Statements children made to their teachers, guidance counselors, and day care providers were routinely admitted as substantive evidence in the prosecution of physical and sexual abuse cases. Similarly, statements made by children to treating doctors and nurses were often the backbone of prosecution's case. However, with its recent ruling, the Ohio Supreme Court has effectively barred the admission of all such statements if the child does not testify.

The impact of this decision cannot be overstated. In Ohio, children under the age of ten are presumed incompetent to testify.[5] This presumption can be overcome in children near the age of ten; however, the

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[4] *State v. Arnold*, 126 Ohio St.3d 290 (2010); *State v. Muttart*, 116 Ohio St.3d 5 (2007); *State v. Stahl*, 111 Ohio St.3d 186 (2006).

[5] Ohio Evid. R. 601(A)

younger the child, the more difficult this task becomes. It is this population, the most vulnerable in our society, whom the *Clark* decision has silenced and deprived of justice. If the *Clark* decision is permitted to stand, Ohio's ability to prosecute those who prey on young children will all but be eliminated. Furthermore, if other states similarly misconstrue the Confrontation Clause, as applied to mandatory child abuse reporting statutes, Ohio's tragedy will no longer be unique. It is for these reason this *amicus* urges the Court to grant petitioners writ of certiorari.

SUMMARY OF ARGUMENT

The Ohio Prosecuting Attorneys Association respectfully urges this Honorable Court grant Ohio's petition for writ of certiorari for two reasons. First, the lower court's decision to treat mandatory reporters of child abuse as *de facto* agents of law enforcement, within the context of Confrontation Clause analyses, has effectively eliminated Ohio's ability to prosecute the majority of child abuse cases in Ohio. Second, this Court has provided little guidance in determining what statements made to individuals other than law enforcement, if any, are testimonial within the meaning of the Confrontation Clause. This case presents the Court with an important opportunity to protect Ohio's children and provide much needed guidance to courts across the country.

ARGUMENT

In *State v. Clark*, the Ohio Supreme Court examined statements L.P., a three–and-a-half-year-old child, made to his preschool teachers identifying his abuser. The Court held that because the teachers were

mandatory reporters of child abuse and questioned the child about past abuse, the statements made by the child were testimonial. When Clark successfully argued the victim was too young to testify at trial, the Court concluded admission of the victim's statements, through the teacher, ran afoul of the Confrontation Clause.[6]

The Court explained that Ohio Revised Code 2151.421 imposed a mandatory duty upon the teachers to report suspected child abuse. In light of that obligation, the Court asserted that the teachers were effectively acting as agents of law enforcement when they questioned L.P. Proceeding from this premise, a 4-3 majority of the Court misapplied the primary purpose test that this Court previously enunciated in *Davis v. Washington*.[7] Utilizing that test, they concluded that the primary purpose of their questioning was to gather evidence potentially relevant to a subsequent prosecution and, therefore, L.P.'s statements were testimonial.

I. Granting a writ of certiorari in this case is necessary as the Ohio Supreme Court's misapplication of *Davis v. Washington* jeopardizes Ohio's ability to prosecute offenses with child victims.

Does the Confrontation Clause preclude the prosecution of up to 60% of all child abuse cases? That is the practical effect of the Ohio Supreme Court's

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[6] *Clark*, 137 Ohio St.3d at 350.

[7] *Davis v. Washington* at 822.

decision in *State v. Clark*. Physical and sexual abuse are crimes of secrecy. These crimes occur behind closed doors and are seldom witnessed by anyone other than the perpetrator and the victim. In light of Fifth Amendment protections, the victim is often the only witness available to the state who can relate the details of the abuse to the jury.

In Ohio, as in many other jurisdictions, witnesses ten years of age and older are presumed competent to testify at trial.[8] In such cases, absent extenuating circumstances, those witnesses who testify at trial will be subject to the rigors of cross examination. However, in cases where the witness is under the age of ten, competency must be established prior to the witness being permitted to testify.[9] Depending upon the age and maturity of the child, this can be difficult, if not impossible to establish.

Unfortunately, children too young to testify are spared neither physical nor sexual abuse. In 2012, 33.8 percent of the children who were sexually assaulted in the United States were eight years old or younger.[10] Similarly, 58.5 percent of the children who were physically abused in the United States in 2012 were eight years old or younger.[11] In 2012, there were 12,351

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[8] Ohio Evid. R 601(A); Ohio Revised Code 2317.01.

[9] *State v. Clark*, 71 Ohio St.3d 466 (1994).

[10] *Admin. For Children & Families, Dept of Health and Human Servs.,Child Maltreatment* 2012, Exhibit 3-E, available at http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf.

[11] *Id.*

substantiated cases of physical abuse and 5,490 substantiated cases of sexual abuse against children in Ohio alone.[12]

During that same year there were 124,544 substantiated cases of physical abuse and 62,936 substantiated cases of sexual abuse against children nationwide.[13] Although these statistics mask the faces of the tens of thousands of children that are victimized each year, they do convey the magnitude of this issue; tens of thousands of child victims will be incompetent to testify each year. In the vast majority of these cases, the only way to establish what occurred is to present the child's statements through other witnesses.

While the lower court's decision could effectively bar the prosecution of Mr. Clark, the broader impact of the decision can be seen by examining a scenario trial courts routinely encounter. Jane Doe, a six year old first grader, is a happy and outgoing young girl. However, her teachers begin to notice she is becoming withdrawn, moody, and inattentive in class; they no longer see her talking to her friends and she has developed serious personal hygiene issues. Because this sudden change concerns her teachers, Jane Doe is called to the office to speak with the guidance counselor. During this conversation, Jane Doe discloses sexual abuse at the hands of a family member.

Based upon her disclosure, a children services worker is contacted who refers the child for medical

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[12] *Id.* at Table 3-8.

[13] *Id.*

examination to assess the health of the child. Prior to meeting with the doctor, Jane Doe speaks with a trained social worker who questions her about her medical history and the details of the abuse; the social worker relates the child's statements to the doctor to assist him in performing his examination. Because the most recent sexual abuse occurred two weeks prior to the examination, no forensic evidence is discovered. The case is referred to law enforcement and is ultimately indicted by a grand jury.

Prior to trial, the defendant successfully argues that Jane Doe is incompetent to testify. Given that ruling, the prosecution relies upon the testimony of the teacher, the social worker, and the doctor. Each witness testifies to the statements Jane Doe made describing the details of the sexual abuse and the identity of the perpetrator. The defendant objects to this testimony as an alleged violation of his right to confront the child he successfully argued should not be permitted to testify. Over his objection, the testimony is presented to the jury.

Before the *Clark* decision, the Ohio Supreme Court routinely approved of this practice.[14] While variations of this precise scenario unfold across the United States on a daily basis, the lower court's decision in this case casts serious doubt upon this practice. The Ohio Supreme Court held that when questioning children "teachers act in at least a dual capacity, fulfilling their obligations both as instructors and also as state agents to report suspected child abuse pursuant to R.C.

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[14] *State v. Arnold*, 126 Ohio St.3d 290 (2010); *State v. Muttart*, 116 Ohio St.3d 5 (2007); *State v. Stahl*, 111 Ohio St.3d 186 (2006).

2151.421."[15] In light of this duty, in the absence of an ongoing emergency, the primary purpose of the questioning is to establish or prove past events potentially relevant to a later prosecution.[16]

The Court reached this conclusion by conflating the concepts of "mandatory reporter" and "mandatory investigator." Stated differently, the court determined that teachers were more like police officers than 9-1-1 operators.[17] Ohio Revised Code 2151.421 required the teachers in this case to report their suspicions of child abuse to the relevant authorities. But the statute placed no obligation on the teachers to question L.P. or investigate the alleged abuse. Despite this omission, the Court below suggests that the statute virtually deputizes the teachers who questioned L.P. Proceeding from this false premise, the Court applied the law as if sworn peace officers had questioned L.P. If this errant reasoning were adopted by other states, the careful distinction the Court crafted in *Davis* would be destroyed.

The decision to treat teachers as *de facto* police interrogators in this case is all the more puzzling when one examines the very authority the Court invoked to support its conclusion.[18] In *Yates*, the Ohio Supreme Court explicitly recognized that the "primary purpose

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[15] *Clark* at 347.

[16] *Id.*

[17] *Davis* at 828.

[18] *Clark* at 350 (quoting *Yates v. Mansfield Bd. Of Educ.*, 102 Ohio St.3d 205 (2004)).

of the reporting [requirement] is to facilitate the protection of abused and neglected children rather than to punish those who maltreat them." This primary purpose to protect children can be contrasted with the mandatory investigation requirements imposed upon children services agencies by R.C. 2151.421(F)(1) and (2) discussed by the Court in the very next sentence of its opinion.[19]

Here, the teacher elicited information to determine whether the child needed medical attention and whether someone at home was the abuser; it would make little sense to inform the abuser and then send the child home to be further abused. Like a 9-1-1 operator, the teacher wanted neutralize the threat the child was facing. Therefore, the primary purpose of this questioning is unlike that of an investigator. Although, it may be proper to consider the presence of the statute when evaluating the teacher's primary purpose, to treat it as dispositive compounds an interpretative error with a constitutional error.

The greater danger of the *Clark* decision arises because the mandatory reporting requirements of R.C. 2151.421 are not limited to just teachers. Ohio Revised Code 2151.421(A)(1)(a) imposes an affirmative duty upon most adults who interact with children in a professional capacity to report known or suspected child maltreatment. The reporting requirement applies to all teachers, child care providers, doctors, nurses, medical professionals, camp counselors, attorneys, therapists, counselors, and numerous other categories

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[19] *Yates* at 209.

of adults.[20] Additionally, every state in the nation has similar mandatory reporting requirements to those that exist in this case.[21] Under the Ohio Supreme Court's analysis in this case, any adult in one of these professions who questions a child about suspected abuse effectively becomes an agent of law enforcement.

If the *Clark* decision is applied to the scenario described above, the statements Jane Doe made to the guidance counselor, the social worker, and the doctor would all be testimonial and prohibited under the Ohio Supreme Court's analysis in this case. While each individual had a legitimate purpose for questioning Jane Doe, other than gathering information to be used in a future prosecution, each individual was also a mandatory reporter under R.C. 2151.421(A)(1)(b). As such, each is also an agent of law enforcement under the *Clark* decision.

Virtually every unbiased adult a child might approach is a mandatory reporter of abuse in Ohio. Once successful in arguing Jane Doe is incompetent to testify, the defendant need merely then invoke the protections of the Confrontation Clause. Shrouded in this perverse protection, the defendant could successfully preclude the state from introducing any account of the sexual abuse. Thus, under the formulation below, an abused child is more likely to get

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[20] Ohio Revised Code 2151.421(A)(1)(b).

[21] See DeFrancis & Lucht, *Child Abuse Legislation in the 1970's* (Rev.Ed.1974) 6; Annotation, Validity, Construction; *Application of State Statute Requiring Doctor or Other Person to Report Child Abuse* (1989), 73 A.L.R.4th 782, 789–790.

justice by confiding in strangers than by confiding in those people we educate children to turn to for help.

Even in light of the lower court's decision, it is conceivable that family members of a victim could potentially testify to the victim's out of court statements. However, it is an unfortunate reality that the vast majority of those abused are victimized by their own family. In 2012, 80.3 percent of the children abused in the United States were victimized by a parent; less than 4 percent of the perpetrators were unknown to the child.[22] If the victim's own parent is the abuser, who else can the child be expected to tell?

Assume now that instead of telling a teacher, Jane Doe disclosed to her mother that her father had sexually abused her. If Jane was believed, it would be reasonable to expect her mother to be hurt and angry at her husband. If, however, her mother believed her husband incapable of such a horrific act, it is equally reasonable to assume that her mother would rally to his defense. Regardless of her mother's reaction, the result is the same; the potential witness relating Jane's statement is a partisan. While long-gone are the days when reliability was the touchstone of the Confrontation Clause, it would still be ironic if the partisan mother could testify as to Jane's statements but her teacher and doctor could not.[23]

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[22] *Admin. For Children & Families, Dept of Health and Human Servs.,Child Maltreatment* 2012, Exhibit 5-D, available at http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf.

[23] *Crawford v. Washington*, 541 U.S. 36 (2004).

In cases of sexual abuse how else, other than through the victim's own words, can the offense be proven? Vaginal tearing and abrasions cannot identify the perpetrator nor establish where that rape occurred. Semen recovered from a victim's underwear may well establish the identity of a perpetrator, but it cannot tell the jury if, when, or where penetration occurred. While blood or semen on a victim's bed can demonstrate where an offense may have occurred, cannot establish sexual conduct. Absent a confession, video evidence of the offense, forensic evidence –if it exists– cannot supplant the statement of the victim.

The adverse impact of this decision on public safety cannot be overstated. L.P stands in the shoes of the thousands of children across this country whose voices will be silenced by the *Clark* decision. Children will not be permitted to tell the jury of their abuse nor will others be permitted to speak on their behalf. Without the statements of L.P and countless victims he represents, the vast majority of child abuse cases cannot be prosecuted. The *amicus curiae* respectfully requests this Honorable Court grant petitioner's writ of certiorari and once again let Ohio's children be heard.

II. A standard is needed by which reviewing courts can determine whether out of court statements, made to individuals other than law enforcement and not acting as agents of law enforcement, are testimonial within the meaning of the Confrontation Clause.

Since this Court's decision in *Crawford*, there has been substantial uncertainty as to what constitutes testimonial statements within the meaning of the Confrontation Clause. In *Crawford*, the Court opined

that, at minimum, testimonial statements must include prior the testimony at a preliminary hearing, before a grand jury, at a former trial, and during police interrogations.[24] However, further development of what else may constitute testimonial statements was reserved for future cases.

In 2006 this Court decided a pair of cases offering additional guidance to lower Courts in determining what constitutes testimonial statements.[25] In those cases, this Court set forth the "primary purpose test" to employ when evaluating statements made in response to interrogations by police and their agents.[26] The Court explained that statements made during a police interrogation, when the declarant was facing an "ongoing emergency," were non-testimonial, as their primary purpose to enable the police to resolve a present emergency.[27] These statements were contrasted with statement made to the police when it was clear that the interrogation was part of an investigation into a suspect's past criminal conduct.

Since *Davis,* the Court has determined that additional types of statements are not testimonial. In *Bryant* the Court found that statements made to police were not testimonial because, when viewed objectively, the primary purpose of the questioning was to end a

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[24] *Id.* at 68.

[25] *Davis*, supra.

[26] *Id.* at 828.

[27] *Id.* at 829.

threatening situation.[28] The Court has also recently opined that DNA results identifying an unknown rapist currently at large would not be testimonial even if admitted to prove his identity at trial as they did not have the primary purpose of accusing a targeted individual of engaging in criminal activity.[29]

These cases must be contrasted with those, like *Hammon*, where the Court determined the statements in question were testimonial. For example, in *Melendez-Diaz* the Court found that a certified laboratory report demonstrating the substance attributed to the defendant was cocaine to be testimonial.[30] Similarly, in *Bullcoming*, the Court found a certified laboratory report showing the defendant's blood-alcohol level exceeded the legal limit was testimonial.[31]

Virtually every post-*Crawford* statement whose admission this Court found offensive to the Confrontation Clause bore two characteristics. [32] In the context of deciding whether a DNA profile produced before any suspect was identified, the Court noted the statements it had previously found testimonial 1) were out of court statements having the primary purpose of accusing a targeted individual of engaging in criminal

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[28] *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

[29] *Williams v. Illinois*, 132 S. Ct. 2221 (2012) at 2243.

[30] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) at 310.

[31] *Bullcoming v. New Mexico*, 131 S.Ct.2705, 2717 (2011).

[32] *Williams* at 2717.

conduct and 2) were formalized statements such as affidavits, depositions, prior testimony, or confessions. While these factors were not referred to as a "test" for lower courts to utilize, they were relevant here but ignored by the lower court in this case.

The statements made by L.P. to his teacher in this case bear neither of these characteristics. When L.P was questioned, no suspect had been identified much less targeted. The statements were made during an informal colloquy between a preschool student and his teacher. One additional commonality between all of the post-*Crawford* statements determined to be testimonial is that they were made to law enforcement or elicited the request of law enforcement. That factor, in addition to those listed in *Williams*, was not present in this case.

Rather than applying the factors set forth in *Williams*, the Ohio Supreme Court believed it was required to apply the primary purpose test set forth in *Davis*. The Court stated that "although a teacher's questioning of a child about suspect injury is consisted with a duty to report potential abuse and arises from a concern to protect a child, the United States Supreme Court's Confrontation Clause analysis requires that we ascertain the 'primary purpose' for the questioning." Utilizing that framework, and presuming that mandatory reporters are agents of law enforcement, the Court held that "when teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator, any statements obtained

are testimonial for the purposes of the Confrontation Clause."[33]

Given the current ambiguity in Confrontation Clause jurisprudence, it is somewhat understandable that the Court utilized the *Davis* framework. However, in doing so the lower court has expanded the definition of 'testimonial' far beyond that which this Court has previously sanctioned. This Court has previously cautioned that testimonial statements mark both the core and perimeter of the Confrontation Clause.[34] That same caution was not present in this case.

Despite this Court's cautionary words, the *Clark* decision instantly created an entirely new class of testimonial statements. Any statement made to a mandatory reporter, interacting with the child in their professional capacity, is testimonial in light of their statutory reporting duties. This Court has never held that the "primary purpose test", as formulated in *Davis*, should be utilized when private citizens make informal inquiries unprompted by law enforcement.[35] Yet, that is exactly what the lower court did in this case.

Recognizing that children are helpless to protect themselves, the legislatures in all 50 states, as well as

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[33] *Clark* at 351.

[34] *Davis* at 823.

[35] *Giles v. California*, 554 U.S. 353, 376 (2008) (explaining that statements made to friends, neighbors, and physicians about abuse and intimidation would be excluded, if at all, only by hearsay rules).

the District of Columbia and three territories, have enacted child-abuse reporting laws.[36] However, it does not follow from these reporting requirements that mandatory reporters are agents of the state when they make simple inquires of children they suspect are being abused. The California, Montana, and Arkansas Supreme Courts have previously considered and rejected that very principle.[37] Because Ohio's mandatory reporting requirement does not deputize broad swaths of the population and there is no evidence that the teachers were questioning L.P at the behest of law enforcement, the *Davis* test is a poor fit in this case.

Examining L.P.'s statements by the criteria set forth in *Williams* compels the conclusion that they are not testimonial and do not implicate the Confrontation Clause. They were not elicited by law enforcement for the purpose of accusing a targeted individual engaging in criminal conduct and they were not formalized statements akin to affidavits, depositions, or prior testimony. In an effort to force this case squarely into the *Davis* framework, the lower court reached the opposite conclusion. The *Amicus Curiae* respectfully requests this Honorable Court grant petitioner's writ of certiorari to provide a test that reviewing courts can employ when evaluating statements elicited during non-law enforcement questioning.

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[36] *Yates* at 207-08.

[37] *People v. Cage*, 155 P.3d 205 (Cal.2007); *State v. Spencer*, 169 P.3d 384 (Mont.2007); *Seely v. State*, 282 S.W.3d 778 (Ark. 2008).

CONCLUSION

The Ohio Supreme Court's misapplication of *Davis* in this case has seriously jeopardized the safety of Ohio's children. Its ruling effectively silenced L.P He is not permitted to testify in light of competency rules and his teachers cannot testify to his statements because they are mandatory reporters. Absent a confession or the presence of an extraordinary array of forensic evidence, the *Clark* decision bars the prosecution of nearly 60 percent of child abuse cases. This cannot be what the Confrontation Clause requires.

The test in *Davis* is aimed at determining when statements made to law enforcement are testimonial. The test is in ill fit for determining what, if any, statements made to non-law enforcement personnel with reporting duties are testimonial. The factors set forth in *Williams* provide an alternative framework for analysis, but this Court has offered limited guidance in this area. To the extent these individuals are viewed as quasi-law enforcement, the Court needs to craft a new test. Accordingly, the *amicus curiae* respectfully requests this Honorable Court grant Ohio's petition for certiorari to review this case and reverse the Ohio Supreme Court's erroneous decision.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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TO THE SUPREME COURT OF OHIO

BRIEF FOR THE STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, MICHIGAN, MISSISSIPPI, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OREGON, SOUTH CAROLINA, TENNESSEE, TEXAS, VERMONT, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does an individual's obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?

2. Do a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

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INTEREST OF AMICI CURIAE[1]

At issue in this case is whether and when statements a child makes to a mandatory reporter of child abuse are testimonial under the Confrontation Clause. The Ohio Supreme Court held that preschool teachers are agents of law enforcement because they are required to report abuse to law enforcement or a child services agency. The court further held that, under the test this Court has adopted for statements made to law enforcement agents, an injured child's statements to a preschool teacher were testimonial. The amici states are deeply troubled by the Ohio Supreme Court's decision and have a significant interest in this Court clarifying how the Confrontation Clause applies in this situation.

When young victims of child abuse are incompetent or too frightened to testify, admission of statements made to a trusted adult is essential to the state's ability to protect children by prosecuting the abuser. Every state has mandatory reporting laws requiring professionals that come into contact with children—including teachers, child care providers, dentists, firefighters, nurses, and pharmacists—to report suspected abuse. A rigid rule classifying mandatory reporters as law enforcement, and presuming that teachers' and other reporters' primary purpose in speaking to children is to gather evidence for criminal prosecution, sweeps far too

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[1] Counsel of record received timely notice of the states' intent to file this amicus curiae brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the states to file this brief.

many statements within the purview of the Confrontation Clause.

ARGUMENT

This Court's landmark decision in *Crawford v. Washington*, 541 U.S. 36 (2004), reshaped the government's obligations under the Confrontation Clause. Under *Crawford*, the Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id.* at 53-54. Critically, however, "not all hearsay implicates the Sixth Amendment's core concerns," and therefore not all hearsay is subject to the Confrontation Clause. *Id.* at 51; *Davis v. Washington*, 547 U.S. 813, 821 (2006). The Confrontation Clause "applies to 'witnesses' against the accused"—and only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Crawford*, 541 U.S. at 51; *Davis*, 547 U.S. at 821.

Crawford declined to adopt a comprehensive definition of "testimonial statement," leaving to later cases a fuller elaboration. Ever since, this Court and lower courts have struggled to draw the line between testimonial and non-testimonial statements. Among the most important and frequently litigated statements are those made by children to teachers, doctors, and other mandatory reporters regarding physical and sexual abuse. The Ohio Supreme Court has adopted an approach, in conflict with other courts, that would treat virtually all such statements as testimonial. Under that approach, prosecutions of

abusers would often be impossible when the child, as is common, is unable to testify at trial. Certiorari is warranted to resolve the conflict and ensure that statements outside the Confrontation Clause's ambit are not improperly subjected to the *Crawford* rule, thereby stymying important prosecutions.

I. Statements to Mandatory Reporters of Abuse Are Critical to State Prosecution of Child Abuse

Construing the Confrontation Clause to bar the admission of statements children make to mandatory reporters of abuse will greatly impair states' ability to protect children by successfully prosecuting abusers. Prosecution of child abuse is a significant issue for the states. Approximately 678,810 children were victims of child abuse in 2012, and an estimated 1,640 children died that year as a result of abuse and neglect. U.S. Dep't of Health & Human Servs., *Child Maltreatment 2012* (2013).[2] The states have a vital interest in protecting young children from abuse by prosecuting those who harm these vulnerable individuals.

Child abuse cases, however, are particularly difficult to try. Robert P. Mosteller, *Confrontation in Children's Cases: The Dimensions of Limited Coverage*, 20 J.L. & Pol'y 393, 394 (2012). Abuse tends to occur in secret and the child is often the only witness. Depending on the nature of the abuse, there may be no physical evidence of the crime or the perpetrator's identity. As the Supreme Court of South Carolina has observed:

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[2] *Available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf#page=13 (last visited June 2, 2014).

> Child abuse differs from other types of crimes in several respects. Specifically, the crime of child abuse often occurs in secret, typically in the privacy of one's home. The abusive conduct is not usually confined to a single instance, but rather is a systematic pattern of violence progressively escalating and worsening over time. Child victims are often completely dependent upon the abuser, unable to defend themselves, and often too young to alert anyone to their horrendous plight or ask for help.

State v. Smith, 750 S.E.2d 612, 614 n.7 (S.C. 2013) (quoting *State v. Fletcher*, 664 S.E.2d 480, 484–85 (S.C. 2008) (Toal, C.J., dissenting)); *see also State v. Chauvin*, 846 So. 2d 697, 702 (La. 2003) ("Child sexual abuse is difficult to prove because it most often occurs in private, often the perpetrator is a member of the victim's family, and physical evidence of the abuse is rare."); *State v. Goblirsch*, 246 N.W.2d 12, 14 (Minn. 1976) ("[D]ue to the fact there are rarely eyewitnesses to child abuse, it is very difficult in these prosecutions to establish the guilt of a defendant other than by circumstantial evidence.") (internal alterations and quotation marks omitted).

Child care providers and others who work with children on a daily basis play an important role in observing and reporting signs of abuse. More than 60% of American children under the age of five are in a regular child care arrangement, where they spend an average of 33 hours a week. Laughlin, Lynda,

Who's Minding the Kids? Child Care Arrangements: Spring 2011, Current Population Reports, 70-135, U.S. Census Bureau (2013).[3] Preschool teachers and child care providers thus have a unique opportunity to observe a young child's injuries or behavioral changes that may indicate abuse. Daily contact between an abused child and a care provider nurtures the child's trust and encourages the child to feel safe in confiding in his or her caregiver. Caregivers are therefore often able to provide important evidence regarding the abuse, including by relating statements the children made to them.

Evidence from caregivers is often critical to the prosecution of these difficult cases. In 2012, nearly 27% of child abuse victims were younger than three-years old and 20% were in the three-to-five-year age group. U.S. Dep't of Health & Human Servs., *Child Maltreatment 2012* (2013).[4] When a young child is unable to testify regarding physical or sexual abuse, the testimony of a trusted care provider may offer the only means of allowing the child's voice to be heard at trial.

Yet because teachers and care providers must report suspicions of abuse, the Ohio Supreme Court ruled that they are agents of law enforcement and that, absent an "ongoing medical emergency," they elicit "testimonial" statements when they ask the child what happened. Pet. App. 6a-7a. This

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[3] *Available at* http://www.census.gov/prod/2013pubs/p70-135.pdf (last visited June 2, 2014).

[4] *Available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf#page=34 (last visited June 2, 2014).

misguided test places a potentially insurmountable burden on the states' ability to prosecute abusers.

Making matters worse, the reasoning applied by the Ohio Supreme Court would deputize not only teachers and child care providers, but also all other mandatory reporters of suspected abuse. State laws mandating who must report abuse include a wide variety of professionals that come into contact with children, including dentists, nurses and physicians, firefighters, paramedics, school personnel, and members of the clergy. *See* Br. of Pet. at 23-24. Eighteen states require that *any* person who suspects child abuse must report it. *See* Pet. App. 38a n.4. Mandatory reporters submit more than one-half of the reports of suspected abuse received annually by state child protective services. U.S. Dep't of Health & Human Servs., *Child Maltreatment 2012* (2013).[5] Since every state has enacted laws requiring the mandatory reporting of child abuse, the Ohio Supreme Court's reasoning will have repercussions nationwide. *Id.*

II. The Ohio Supreme Court Erred in Holding That Statements Made to a Preschool Teacher Are Testimonial Statements to a Law Enforcement Agent

This case involves a commonplace occurrence: a teacher asking a child with a bruise what happened. If members of the general public were asked what purpose the teacher had in asking the question, responses would probably be ensuring the

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[5] *Available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf#page=22 (last visited June 2, 2014).

wellbeing of the child, bringing order to the classroom, and dealing with potential classroom bullies. Few if any would consider the teacher a "law enforcement agent" who elicited the information with an eye toward a future criminal prosecution. Yet that is precisely what the Ohio Supreme Court held here. The law should not defy common sense. L.P.'s teachers were not acting as law enforcement agents, and L.P did not give "testimony" when he answered his teachers' questions. The Confrontation Clause therefore does not apply to his statements.

The Ohio Supreme Court's holding is deeply flawed in at least two respects. First, requiring preschool teachers to report suspected abuse does not transform them into law enforcement agents. The Ohio Supreme Court therefore should not have applied the "primary purpose" test that governs whether statements made to law enforcement agents are testimonial.

Second, even if preschool teachers were law enforcement agents, the Ohio Supreme Court wrongly converted the "primary purpose" test into an any-purpose-other-than-dealing-with-an-ongoing-emergency test. The court found that no emergency existed, and that the teachers were instead trying to obtain information. That was enough for the court to hold that L.P.'s statements were testimonial. But the primary purpose test does not deem as testimonial any statement made in a non-emergency situation. It asks whether a "statement is procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011). Even if L.P.'s teachers were not dealing with an emergency (a

questionable proposition in itself), it strains credulity to suggest that reasonable persons in the teachers' shoes would be focused on a future criminal trial, as opposed to dealing with health, safety, and classroom order. The Ohio Supreme Court's vast expansion of the universe of testimonial statements should not be permitted to stand.

A. Mandatory Reporters of Child Abuse Are Not Law Enforcement Agents

To date, the Court has addressed whether statements are testimonial only in the context of statements made to law enforcement, reserving "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Davis*, 547 U.S. at 823 n.2. *See also Bryant*, 131 S. Ct. at 1155 n.3 (internal quotation marks omitted) (also leaving open that question). That phrasing—which leaves open the possibility that statements made to non-law-enforcement agents are never testimonial—suggests at the very least that statements made to non-law-enforcement agents are unlikely to have been made with an eye toward securing information for prosecutorial purposes. *See also Crawford*, 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). A critical first step in this case and all cases like it, therefore, is determining whether the teachers should be deemed law enforcement agents. In holding that they should, the Ohio Supreme Court vastly—and improperly—expanded the universe of law enforcement personnel.

Mandatory reporters of child abuse are not law enforcement agents and are not charged with conducting investigations to gather evidence. Indeed, many mandatory reporters, from preschool teachers to doctors to clergy members, are not even government employees. Rather, they are simply citizens required to protect children by informing others of their suspicions so that an investigation can be carried out by the police or child protective services. To this end, Ohio requires mandatory reporters with knowledge that a child "has suffered or faces a threat of suffering" any physical or mental injury to "immediately" inform the public children services agency or the police by telephone or in person. Ohio Rev. Code § 2151.421. Some states require that the report be put in writing; others do not. *See, e.g.*, Mass. Ann. Laws Ch. 119 § 51A(a) (written report); Conn. Gen. Stat. § 17a-101b(a) (oral report); Wash. Rev. Code § 26.44.040 (initial oral report, written report may be requested).

Critically, mandatory reporters are not deputized to conduct law enforcement investigations. On the contrary, that responsibility is specifically entrusted to state child protective services agencies and the police. After it receives a telephone call regarding potential abuse, the Ohio public children services agency is statutorily required to conduct an investigation within 24 hours. When the agency completes its investigation, it makes a recommendation to the prosecutor. Ohio Rev. Code § 2151.421(F). The other states' systems operate similarly. Child protective services or the police are responsible for investigating allegations of abuse or neglect. *See, e.g.*, Wash. Rev. Code § 26.44.050;

Tex. Fam. Code Ann. § 261.301(a); 325 Ill. Comp. Stat. 5/7.4. In fact, mandatory reporters such as child care providers are sternly warned that asking probing questions "can harm subsequent [child protective services] or legal processes." U.S. Dep't of Health & Human Servs., *The Role of Professional Child Care Providers in Preventing and Responding to Child Abuse and Neglect* (2008).[6]

Rather than acting as law enforcement agents, preschool teachers have a routine professional responsibility to question children about injuries so that they can protect the health and safety of the children in their care. It is common for children to receive injuries during the normal course of their play. U.S. Dep't of Health & Human Servs., *Role of Professional Child Care Providers in Preventing & Responding to Child Abuse and Neglect* (2008).[7] When they see an injured child, care providers need to learn how the child was hurt, whether they need medical help, and whether the injury was caused by another child hitting, biting, or throwing something at the injured child. This information allows care providers to intervene and stop any threat to the children's safety.

The preschool teachers here, Jones and Whitley, needed to protect L.P.'s health and safety, as reflected in their questions. When Whitley saw that L.P.'s eye was bloodshot, she asked him, "What

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[6] *Available at* https://www.childwelfare.gov/pubs/usermanuals/childcare/chapterthree.cfm (last visited June 4, 2014).

[7] *Available at* https://www.childwelfare.gov/pubs/usermanuals/childcare/chaptertwo.cfm (last visited June 4, 2014).

happened?" Pet. App. 3a. When L.P. said he fell, Whitley asked, "How did you fall and hurt your face?" Pet. App. 3a, 4a. When Whitley later noticed additional injuries, she was "kind of like in shock" and again asked what happened. Pet. App. 20a. Jones, the lead teacher, looked at the injuries and asked, "Whoa, what happened?" and "Who did this?" Pet. App. 4a, 20a. When L.P. responded "Dee, Dee," Jones needed to determine if "Dee" was a child. *Id.* She asked whether Dee is "big or little." Pet. App. 21a. These questions allowed the teachers to learn whether another child was hurting L.P., whether there was a safety hazard at the child care center that was causing children to be hurt, and whether L.P. would shortly be leaving with a possible abuser.

The notion that preschool teachers who ask a bruised child what happened are law enforcement agents verges on the outlandish. Indeed, it is difficult to imagine how Jones and Whitley could have asked any fewer questions to fulfill their need to determine whether L.P was being harmed at the preschool. After learning that the harm was not caused by another child, and that L.P. may have been abused, the questioning stopped and a phone call was made to the county children and family services agency. Pet. App. 4a. The police did not participate in the questioning, were not present during the questioning, and did not ask the preschool teachers to ask any questions. Neither the police nor the child services agency had any knowledge of the questioning at the time it was performed.

Not surprisingly, then, and contrary to the Ohio Supreme Court, many courts have held that the duty to report child abuse does not make mandatory

reporters law enforcement agents. *See* Pet. at 18-23. For example, the California Supreme Court held that although doctors must report suspected child abuse, an emergency room doctor did not act as a law enforcement agent when he asked a bleeding fifteen-year-old boy "what happened." *People v. Cage*, 155 P.3d 205, 218-20 (Cal. 2007). "[T]he reporting statute does not oblige a doctor to *investigate* or *ascertain*, for purposes of possible criminal prosecution, whether a patient has suffered such abuse." *Id.* at 219; *see also, e.g.*, *State v. Spencer*, 169 P.3d 384 (Mont. 2007) (mandatory reporter laws did not deputize a professional counselor or foster parent); *People v. Duhs*, 947 N.E.2d 617 (N.Y. 2011) (doctor's primary duty is medical assistance, not law enforcement); *Seeley v. State*, 282 S.W.3d 778 (Ark. 2009) (mandatory reporter law did not deputize social workers). Two federal courts of appeals have reached similar conclusions. *United States v. DeLeon*, 678 F.3d 317 (4th Cir. 2012), *rev'd on other grounds*, 133 S. Ct. 2850 (2013) (social worker's reporting requirements not determinative in evaluating whether statements were testimonial); *United States v. Squire*, 72 M.J. 285 (C.A.A.F. 2013) (pediatrician not acting as law enforcement even though he knew statements might be used in a later trial).

B. Even if They Were Law Enforcement Agents, the Teachers' Primary Purpose Was Not to Gather Testimony for Use in a Criminal Prosecution

After holding that the teachers were law enforcement agents, the Ohio Supreme Court purported to apply the primary purpose test set out in *Davis v. Washington* and applied in *Davis* and

Bryant. The court's application of the test, however, was deeply flawed and produced the startling result that virtually any statement elicited by a teacher, daycare provider, nurse, or other mandatory reporter in a non-emergency situation will be deemed testimonial. That outcome defies common sense and, more importantly, this Court's precedent.

The most fundamental flaw in the Ohio Supreme Court's reasoning was its creation of a strict dichotomy: questions either "deal with an existing emergency" (in which case they are not testimonial) or they "gather evidence potentially relevant to a subsequent criminal prosecution" (in which case they are testimonial). Pet. App. 9a. In the court's view, once it found that no emergency existed, it necessarily followed that the teachers' primary purpose was to "establish[] past events potentially relevant to a later criminal prosecution." Pet. App. 3a. As this Court explained in *Bryant*, however, "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155. How could it be otherwise? People ask questions for myriad reasons, of which dealing with emergencies and "creating an out-of-court substitute for trial testimony" are only two. *Id.* at 1155.

Had the Ohio Supreme Court considered other reasons, the outcome would surely have been different. A reasonable teacher in Jones' and Whitley's shoes would have asked questions to assess the risk of harm to L.P. and to determine whether one of the other children was misbehaving. That is

what preschool teachers do every day; their focus is not on future criminal prosecutions. Moreover, the questions were "informal and spontaneous" and were asked "on the spot in the classroom," rather than in a police station or on a 9-1-1 call. Pet. App. 40a. As this Court explained in *Bryant*, the informality of the encounter, while not dispositive, "informs" the primary purpose inquiry and militates against finding that the primary purpose was to prove past events in anticipation of later prosecution. *Bryant*, 131 S. Ct. at 1160.

To be sure, L.P.'s teachers had a duty to report suspected abuse and were presumably aware of that duty when they asked L.P. what happened. As this Court has recognized, "dual responsibilities may mean that [interrogators] act with different motives simultaneously or in quick succession." *Bryant*, 131 S. Ct. at 1161. When an interrogator has dual purposes, the *primary* purpose still must be objectively ascertained by focusing on the understanding, statements, and actions of all of the participants. *Id.* at 1161-1162. And that brings us back to the common-sense inquiry of why a reasonable teacher would ask a bruised child what happened: to address the child's health and safety and ensure classroom order, or to "creat[e] an out-of-court substitute for trial testimony"? Given the limited role teachers have in the law enforcement process—not to investigate, but merely to report to others—and their continual, routine obligation to care for their students, the answer is self-evident.

By rigidly classifying all encounters as either an emergency or an interrogation to gather information for trial, the Ohio Supreme Court

distorted the primary purpose test in a manner that "creates a beneficial catch-22 for pedophiles and other abusers of children." Pet. App. 46a (O'Connor, C.J., dissenting). It prohibits "[t]he very people who have the expertise and opportunity to recognize child abuse" from testifying to out-of-court statements when the child is unable to testify. *Id.*

The other fundamental flaw of the Ohio Supreme Court's primary-purpose analysis was its failure to undertake "a combined inquiry that accounts for both the declarant and the interrogator." *Bryant*, 131 S. Ct. at 1160. As the Court has emphasized, "what was *asked and answered*" must be viewed objectively to determine the purpose of the questioning. *Id.* (citing *Davis*, 547 U.S. at 827). Focusing solely on the interrogators' purpose, the Ohio Supreme Court ignored the requirement that it also consider the declarant's purpose.

There is no indication that L.P. intended to create evidence for Clark's trial. His short answers did not volunteer anything more than the minimal amount required of him. He stated only that he fell, Dee did it, and Dee is big. Pet. App. 20a-21a. And even if L.P had provided more information, a three-year-old child is highly unlikely to have even a rudimentary understanding of the legal system and would not understand that his answers could lead to or be used in a criminal trial. The spontaneous, informal nature of the teachers' questions, without any police present, would not lead a reasonable child to believe the answers were intended to provide information for a criminal trial.

In sum, even if mandatory reporters such as Whitley and Jones are considered law enforcement agents, the absence of an emergency does not terminate the Confrontation Clause analysis. It is still necessary to consider the totality of the circumstances to determine the primary purpose of the interrogator and the declarant. Short-circuiting the analysis ignores this Court's affirmation that there may be other circumstances in which the primary purpose is not to create a substitute for testimony during trial. *Bryant*, 131 S. Ct. at 1155.

CONCLUSION

The Court should grant the petition for writ of certiorari.

RESPECTFULLY SUBMITTED.

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JOINT APPENDIX

No. 13-1352

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED MAY 8, 2014
CERTIORARI GRANTED OCTOBER 2, 2014

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5/23/12	Record
5/23/12	Clerk's notice of filing of record
6/26/12	Stipulation to extension of time to file merit brief to 7/23/12 (filed by State of Ohio)
7/23/12	Appellant's merit brief (filed by State of Ohio)
7/23/12	Brief of amicus curiae Ohio Attorney General Michael DeWine in support of appellant (filed by Michael DeWine)
8/21/12	Stipulation to extension of time to file merit brief to 9/11/12 (filed by Darius Clark)
9/10/12	Appellee's merit brief (filed by Darius Clark)
9/11/12	Brief of amicus curiae Ohio Public Defender in support of appellee (filed by Ohio Public Defender)

10/1/12 Reply brief (filed by State of Ohio)

10/1/12 Reply brief of amicus curiae Ohio Attorney General Michael DeWine (filed by Michael DeWine)

10/15/12 Oral argument scheduled for Wednesday, January 23, 2013

10/17/12 Notice of oral argument to be held on Wednesday, January 23, 2013

12/7/12 Motion to dismiss appeal as improvidently allowed (filed by Darius Clark)

12/20/12 Entry denying motion to dismiss

1/8/13 Joint motion of appellant and amicus curiae Ohio Attorney General Michael DeWine for divided argument time (filed by State of Ohio and Michael DeWine)

1/10/13 Entry granted; amicus curiae shall share the time allotted to appellant

1/11/13 Notice of appearance of John T. Martin as counsel of record and Erika B. Cunliffe as co-counsel (filed by Darius Clark)

1/22/13 Notice concerning oral argument of the State of Ohio and amicus curiae Ohio Attorney General Michael DeWine (filed by State of Ohio and Michael DeWine)

1/23/13 Oral argument held

8/5/13 Notice of withdrawal of Alexandra T. Schimmer and Elisabeth A. Long as counsel of record and designation of Samuel Peterson as counsel of record (filed by Michael DeWine)

10/30/13 Decision: Affirmed. See Opinion at 2013-Ohio-4731

11/8/13 Notice of Appearance of Katherine Mullin as counsel of record (filed by State of Ohio)

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10/6/14 Notice of granting of writ of certiorari and leave to proceed in forma pauperis

STATE OF OHIO)
) SS: WILLIAM J. COYNE, JR.
CUYAHOGA CTY)

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION

Case No. CR-10-536300-A
C/A: CA 10 096207
(Filed Jan. 31, 2011)

THE STATE OF OHIO,

Plaintiff,

-v-

DARIUS CLARK,

Defendant.

APPEARANCES:

WILLIAM D. MASON, ESQ., Prosecuting Attorney, by: JENNIFER DRISCOLL, ESQ. and KRISTIN KARKUTT, ESQ. Assistant County Prosecutor,

On behalf of the Plaintiff;

CHARLES M. MORGAN, JR., ESQ.,

On behalf of the Defendant.

COMPETENCY HEARING OF L.P.

* * *

[10]

DIRECT EXAMINATION OF [L.P.]

BY MS. DRISCOLL:

Q. Can you say your name?

A. [L.].

Q. [L.], what's your last name?

A. [P.].

Q. Can you talk again? How old are you?

A. Four.

Q. Can you say it into the microphone?

A. Four.

MS. DRISCOLL: No. Is it on, Your Honor? Can you hear, Chuck?

MR. MORGAN: Yeah.

Q. And do you know when your birthday is?

A. No.

Q. Yes, you do.

A. No, I don't.

Q. What day did you turn four?

A. Since Thursday.

Q. Since Thursday?

A. Yeah.

Q. You told me earlier when your birthday was.

A. When?

Q. Is it September 26th?

[11] A. Yes.

Q. All right. Do you go to school?

A. No.

Q. Are you telling the truth right now?

A. Yes.

Q. Do you go to school?

A. Yes.

Q. Where do you go to school?

A. Across the street.

Q. Across the street?

A. Yes.

Q. And what grade are you in?

A. First grade.

Q. Are you in first grade?

A. Yes.

Q. Is that the truth?

A. Yeah.

Q. Are you in kindergarten or preschool?

A. No.

Q. No?

A. I'm not going to preschool.

Q. You're in preschool?

A. No.

Q. Are you telling the truth?

A. Yes.

[12] Q. Do you know the difference between the truth and a lie?

A. No. No.

Q. Do you know the difference, [L.P.]?

A. No.

Q. If I said today's your birthday, would that be the truth?

A. Yes.

Q. It would be?

A. Yes.

Q. Is today your birthday?

A. Yeah.

Q. It is?

A. Yes.

Q. Where's your cake?

A. My cake's gone.

Q. It's gone?

A. Yeah.

Q. Who's your teacher?

A. Ms. Smith.

Q. Ms. Smith?

A. Yes.

Q. And what do you like to do at school?

A. I like to do toys.

Q. I can't hear you.

[13] A. I said I like to do toys and –

Q. You like to play toys?

A. Yes.

Q. All right. Do you know who you live with? Do you know who you live with?

A. No.

Q. [L.P.], who do you live with?

A. [T.T.], my mama – mama.

Q. Who's your mom?

A. Is this microphone on?

Q. Yes. Do you live with your mom Jackie?

A. Yes.

Q. Okay. Who else do you live with?

A. I live with [T.T.].

Q. You live with [T.T.] now?

A. Yes.

Q. Or did you used to live with [T.T.]?

A. I live with [T.T.] now.

Q. Are you telling the truth?

A. Yes.

Q. Do you get in trouble when you tell lies?

A. Yeah.

Q. What happens when you tell lies?

A. I get in trouble.

[14] Q. What kind of trouble?

A. Whooping.

Q. A whooping?

A. Yeah.

Q. Who gives you whoopings?

A. I don't know.

Q. Do you know the difference between right and wrong?

A. Yes.

Q. Okay. And so is it right or wrong to tell a lie?

A. Wrong.

Q. It's wrong?

A. Yeah.

Q. Do you remember what presents you got for Christmas last year?

A. No.

Q. No? Do you remember what presents you got for your birthday?

A. Yes.

Q. What did you get for your birthday?

A. A spiderman.

Q. Can you talk into the microphone, [L.P.]? Remember I told you, you got to talk to the judge.

A. Yes.

[15] Q. And are you going to tell the judge the truth?

A. Yes.

Q. Okay. So who do you live with?

A. My mama.

Q. And who else lives with your mom Jackie?

A. My first mama.

Q. Your first mom?

A. Yeah.

Q. Who's your first mom?

A. My mama.

Q. Is that Jackie or [T.T.]?

A. Jackie.

Q. Jackie's your mom? Okay. Does your little sister live there?

A. Zandi.

Q. [A.T.]? Zandi? Is her name Zandi?

A. Yes.

Q. Zandi? How old's Zandi?

A. Four.

Q. How old are you?

A. Four.

Q. How old's Zandi?

A. Two.

Q. Two? So if you said –

A. Zandi a baby.

[16] Q. She's a baby? So if you said Zandi was four, would that be the truth or a lie?

A. A lie.

Q. Have we met before, [L.P.]?

A. What?

Q. Have we met before?

A. I think so.

Q. Yeah? Do you remember when you lived with [T.T.]? Do you remember when you lived with [T.T.]?

A. No.

Q. No?

A. Yes.

Q. Do you remember when you lived with Dee?

A. No.

Q. Do you see Dee here today?

A. No.

Q. Did you look around the room?

A. In my room?

Q. Can you look around this room and tell me if you see Dee?

A. No. What?

Q. Can you look over here?

A. No. Ouch.

Q. You hit your head?

A. Hey. Hey, y'all –

[17] THE COURT: Counsel, the Court, I believe – I've heard enough out of – this child is not competent to testify. Watching the – he's gone already. Watching his demeanor on the stand – and its, by the way, perfectly understandable to deal with this kind of behavior, but he's definitely not competent in this Court's opinion. So that's my ruling. He will not be able to testify as a witness.

MR. DRISCOLL: Thank you, Your Honor.

THE COURT: Sorry.

THE WITNESS: Thank you.

THE COURT: Okay. We'll go off the record.

(Thereupon, a discussion was had off the record.)

THE COURT: We'll go on the record here. Why don't you make your motion and give me any citations of law that you have or copies of cases that you have so it'll be on the record.

Mr. Morgan has a motion he wants to make to the Court.

MOTION IN LIMINE

[18] MR. MORGAN: Your Honor, I would make a motion in limine to have the prosecutor precluded, A, in opening statement and, B, throughout trial to have anybody make any statement that [L.P.] – and what I'm expecting is [L.P.] to say "Dee did it," Dee being the nickname for my client, Darius.

I believe the State will attempt to get them into evidence either through a police officer, a social worker, the child's mother's family, possibly hospital workers, and preschool teachers.

Your Honor, the gist of Crawford – and I understand 807. If Crawford wasn't around, I'd have no argument. And I would say that to the Court – or to the prosecutor. I have no – Crawford allows an individual to confront their accusers. It's a constitutional right, and I think that constitutional right trumps any rule of construction such as 807.

We just saw the young child on the stand. The State is going to try to obtain a conviction using those statements from a young child. And we just saw that young child. [19] He's all over the place.

And ultimately what you have, if the Court allows it in, is the jury to hear a statement from an individual where that individual says [L.P.] said this. And the jury doesn't have the advantage of seeing – since [L.P.] is not competent, the jury doesn't have the advantage of seeing how across

the board and, you know, how [L.P.] was acting like a normal four-year old.

So they're trying to get those statements in, Your Honor. And I think it's violative of Crawford, and it doesn't allow my client to face his accuser in this. So I would ask – what I'm relying upon is the Crawford case.

THE COURT: What's the citation?

MR. MORGAN: I don't have it with me. I apologize. I can get it at lunch if you want me to bring it.

THE COURT: On behalf of the State?

MS. DRISCOLL: Thank you, Your Honor. Ohio Rules of Evidence 807(A) states [20] that an out-of-court statement made by a child who's under 12 years of age at the time of trial's hearing, describing any sexual or physical violence performed by, with, or on the child is not excluded as hearsay under Evidence Rule 802 if all of the following apply: One, the Court finds that the totality of the circumstances surrounding the making of a statement provides particularized guarantees of trustworthiness and make the statement, at least as reliable a statement admitted pursuant to Evidence Rules 803 and 804.

The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement.

In making its determination of reliability of the statement, the Court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistencies of statements, the mental state of the child, the child's motives or lack of [21] motives to fabricate, the child's use of terminology unexpected of a child of similar age, and the lapse of time between the act and the statement.

In making this determination, the Court shall not consider whether there's independent proof of the sexual or physical violence.

Second, the child's testimony is not reasonably obtainable by the component of his statement.

Obviously, this Honorable Court has just found this child not competent to testify at this time. The child's testimony is not reasonably obtainable at this point.

If there's independent proof of the physical violence, which we do have independent proof through photos and through testimony of people who witnessed this child at the time of the physical violence – and we have provided, in writing, Mr. Morgan all the statements we intend to introduce here. Those would be statements to the teachers, social workers, family members.

And so I think that we have met our [22] burden to go forward with 807. These are non-testimonial. The social worker – these were not for investigating purposes. They weren't taking these statements from this child in order to prepare him for Court. They were trying to figure out if this child was

going to be safe in a placement and who did this to the child for medical purposes, for placement, things of that sort.

So these are non-testimonial statements made by this child. The exceptions would be to 807, 802, 803, 804. We feel we've met every prong of the requirements of 807 and we ask that we are able to introduce these statements. Thank you, Your Honor.

MR. MORGAN: Your Honor, if I may –

THE COURT: You may.

MR. MORGAN: – respond briefly. A, I certainly, for the record, would admit that Ms. Driscoll has provided me with all those statements. I'm not alleging that she hasn't.

807 was written and codified on July 1 of 1991. That is well before Crawford.

[23] Crawford, I would submit to the Court, trumps it. So even if he's available, unavailable or whatever, Crawford trumps it. Just – 807 doesn't really apply to Crawford in this situation.

The trustworthiness of the statement, my reading is, most of the time, the young child said "I fell," first. "I don't know what happened." And then further questioning said, "Dee did it."

So when you're talking about trustworthiness, it's not something like a present sentence compression where he just blurted it out, "Dee did it." He gave an answer prior to that saying "I fell" or "I don't know what happened."

So the trustworthiness aspect of it really isn't there, and I think we can see from his previous testimony during the competency hearing.

Bottom line, Judge, the State is trying to make his statement competent, trustworthy and everything by bringing it in through these other people without the jury having the ability to see the young child and [24] attribute that statement, see the child as a person who that statement is attributed to. And that statement is pretty damaging to my client. I think he's not – it's violative of Crawford. Thank you.

MS. DRISCOLL: Your Honor, State v. Brock is a 2008 Westlaw, 2582574, in that they go through a Crawford analysis. And in that case they were talking about child named Lizzie. We cannot find Lizzie's statements to –

THE COURT: Okay. State vs. Brock –

MS. DRISCOLL: Brock, B-r-o-c-k.

THE COURT: I got that part. What was the cite?

MS. DRISCOLL: 2008 Westlaw 2582574. And they do the entire analysis that we've conducted here where they go through the 807 prongs, and they say that they cannot find that Lizzie's statements to Charmaine were testimonial in nature as these statements do not meet the tests for testimonial statements that are submitted in court. They are not ex [25] parte in-court testimony or its functional equivalent.

Extrajudicial statements contained in formalized testimonial materials or statements that are made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, and that's the Crawford test. Crawford's 541 U.S. at 51 and 52.

This Court had –

THE COURT: Crawford is –

MS. DRISCOLL: 541 U.S. – and I'm looking for – this is at U.S. 51 and 52. This – and I can find –

THE COURT: That's close enough. 541 U.S. 51. Okay.

MS. DRISCOLL: This Court's previously held that when a child exposes abuse to a family member, those statements are non-testimonial in nature, see State v. Osborne, Third District, Number 1-06-94. And I can provide you with that.

So Ohio law has always stated that these sorts of statements are non-testimonial [26] in nature and do not violate Crawford. And I can provide you with this. Do you want me to make you a copy as well?

MR. MORGAN: Sure.

THE COURT: I'll take a copy.

All right. What I'm going to do, I'm going to take this under advisement so that we can begin the impanelment of the jury. There's a jury waiting downstairs. And this is the first I hear there's a

motion in limine. I do want to spend some time on it.

We'll call the jury. And during the voir dire, obviously, nobody's doing to mention these statements anyway. So we'll have sufficient time to try and rule on it before opening statements so that we don't have any misstatements during the opening statements by counsel. It might be inconsistent with the ruling of the Court.

MR. MORGAN: Thank you, Judge.

MS. DRISCOLL: Thank you, Your Honor.

THE COURT: Call the jury.

RULING ON
MOTION IN LIMINE

[163]

* * *

THE COURT: The Court has – the jury's excused – has taken into consideration the motion in limine of defense counsel relative to the statements, and the Court has reviewed the statements. One is from a Debra Jones, which is a school teacher at William Patrick Day Head Start Program; and it deals with certain statements and observations she made of the three-year-old boy, one of the victims here, [L.P.].

The other is a statement from – it looks like Ramona Whitley, from the Council of Economic Opportunities in Greater Cleveland, who is also familiar with [L.P.], knowing him as a student. And, again, it refers to things that she saw on his person and the observations that she had made of his body and certain injuries, without going into them, on or about March 16th or March 17th.

And if I didn't say it earlier [164] regarding the Jones statement, it was Wednesday March 17th.

The Court finds that if the statements are not testimonial in nature, then finding the child incompetent to testify does not preclude the admission of the statements at trial.

The Court cites, for that proposition, State vs. Silverman, 121 Ohio St. 3d 591, a 2009 case from the Supreme Court of the State of Ohio, authored

by Justice O'Connor at that time. And reading the holding in the case by Justice O'Connor, the Court held that the child's victim hearsay statements contain sufficient indicia of reliability and particularized guarantees of trustworthiness such that the statements were admissible, despite lack of determination as to the child's competence to testify.

Reading further in the Silverman's case at page 4, the Court went on to say, Because we find that admissibility under Evidence Rule 807 is not dependent on the child's competence, we need not determine if competency can be established by extrinsic [165] evidence.

The Court went on in its analysis – and I'm quoting again later on in the same page – Notably absent from the rule is any requirement that the child declarant be determined to be competent to testify before the statement is admitted.

The Court did review the case of the State of Ohio vs. Dennis Brock from the Third District, Hancock County, as cited by the prosecutor earlier, and the Crawford case as cited by defense counsel and his arguments earlier. The Court does find, after reviewing the statements, that the out-of-court statement made by the child, not only under the age of 12 but under the age of 5 in this case, should not be excluded as hearsay under Evidence Rule 802.

And the Court finds that the totality of circumstances surrounding the making of the statement here provide as particular guarantees of

trustworthiness, that they're made to the teachers or the instructors and that the statements, at least as reliable as statements admitted, pursuant Evidence Rule [166] 803 and 804, it appears to the Court the child or children were unlikely to be telling – strike the word – particularly – likely to be telling the truth when the statements were made; and the tests of cross-examination would add little to the reliability of the statements.

It appears there is no motive or fabrication likely to be used by the child when talking to the two teachers. Also, when dealing with the teachers, I believe they have a legal duty to report what they found and what they heard on these separate occasions.

So the Court is going to permit those, as I indicated, for the reasons stated, and particularly in view of the State vs. Silverman, which the Court adopts here as authority for my ruling.

Is any there anything further by the State?

MS. DRISCOLL: Your Honor, I do have the CSF records here that are dated on 3/17, the day that this child was discovered with the bruises, as well as on 3/18 where he had told social workers that Dee did it. [167] That's the top page.

THE COURT: These are on the records that you want to introduce?

MS. DRISCOLL: Yes, Your Honor.

THE COURT: All right.

MS. DRISCOLL: For the same reasons.

THE COURT: I see it. And this is an activity log created by, one, Elizabeth Grizer, G-r-i-z-e-r, responsible of working – person creating an assessment of the child at 4:15, apparently on March 17th, 2010. It says, apparently, [L.P.] had marks on his face, stomach, upper back; appear to be welts. His eye is pink. And after saying initially he fell down the stairs, then he said Dee – that's D-e-e – did it.

And then the other portion of the investigation dealt with a conversation with the victim on March 18th at the home of the mother, [T.T.], said he appeared to have belt marks on his face, welts on his stomach and back, several were also looped extension cords marks on the upper back, and a square bruise on his stomach. She says he [168] said Dee hit him with the belt.

All right. The Court, for the same reasons, will permit the introduction of these. These are the social workers apparently who were involved. And the Court finds that psychiatrists and social workers, they're actually treatment givers in these situations, and I think they're reliable and certainly fall within the, you know, Court's findings that the statements are not testimonial in nature. Again, the child being incompetent to testify does not preclude the admission of the statements from trial.

And the circumstances, I think, establish that the child was particularly likely to be telling the truth when interviewed by the social workers and teachers as I have indicated. They appear to be

spontaneous and would lack, I believe, any motive of the child to pick Dee out of the blue to fabricate this type of a statement. So that's the order of the Court.

Mr. Morgan's exceptions are noted for the record.

MR. MORGAN: Your Honor, if I [169] may, to preserve it for appeal, would the Court like each time that it's introduced that I object; or can the Court just note a continuing objection –

THE COURT: No. I think that –

MR. MORGAN: – throughout the trial just so I can preserve –

THE COURT: Naturally, I wouldn't prohibit you from doing anything you think is in the best interest of your clients. But for the record, I will state that your – any reference to these will continue – we will consider it that you have a continuing objection as stated right now.

MR. MORGAN: Thank you very much, Your Honor.

THE COURT: I'll give these back to the Cuyahoga County prosecutor.

MS. DRISCOLL: Thank you, Your Honor. I appreciate that.

THE COURT: And for the record – I think you've already stated it, Mr. Morgan – you were provided copies of those before the trial.

TESTIMONY OF
RAMONA WHITLEY

* * *

[234] The STATE OF OHIO, to maintain the issues on its part to be maintained, called as a witness, RAMONA WHITLEY, who, being first duly sworn, was examined and testified as follows:

[235] THE COURT: You may take the witness stand right there.

You may proceed.

MS. DRISCOLL: Thank you, Your Honor.

* * *

DIRECT EXAMINATION OF RAMONA WHITLEY

BY MS. DRISCOLL:

Q. Good morning. How are you?

A. Good morning. Okay.

Q. Could you please state you name for the record?

A. My name is Ramona J. Whitley.

Q. Are you currently employed?

THE COURT: Spell your last name for the reporter, please.

THE WITNESS: W-h-i-t-l-e-y.

Yes, I am.

Q. And where are you currently employed?

A. CEOGC Head Start.

Q. And what does that stand for?

A. Council for Economic Opportunities of Greater Cleveland.

Q. Okay. And what do you do for –

A. Preschool teacher.

[236] Q. Where do you teach?

A. William Patrick Day Head Start Center.

Q. What are your duties at William Patrick Day?

A. Care for children, teach them different things. Care for children and teaching them things.

Q. And how old are these children?

A. Three-, four-, and five-year olds.

Q. How long have you been employed?

A. 15 years.

Q. With William Patrick Day?

A. With the agency. Yes.

Q. Okay. And how long have you been with William Patrick Day?

A. About nine years.

Q. And you were employed there last March?

A. Yes, I was. Yes.

Q. And do you recall a student name [L.P.]?

A. Yes.

Q. And what do you recall about [L.P.]?

A. Well, I recall seeing him one afternoon coming in. Prior to – actually, while sitting at lunch, I was transitioning, sitting at the lunch table, and I noticed that he had a nice haircut. Your hair looks nice. Then I noticed something in his head, like [237] a – actually, it was his eye I noticed. It was kind of red.

So from looking at his head, I just kind of said, What happened? He said, I fell. First, he said nothing. First, he said nothing. Then he said, I fell. I fell.

How did you fall and hurt your face?

I fell down.

I said, Well, okay.

So I didn't think too much of it. And then after leaving the lunchroom we went to the classroom where the light is more reflective. The light, it shines better. It's a brighter bulb. So when I went to the classroom, that's when he sat down and began to play, and I kind of noticed him playing at the table. So I stood up, and that's when I was like, Oh, what happened? I was kind of like in shock, because I'm noticing marks on his head.

Q. What kind of marks?

A. Red marks, like whips of some sort – and brought it to the attention of the – of a co-teacher.

I said, Can you take – I want you to take a look at something. And that's when the other co-teacher came to look at it. And she was like, [238] Whoa, what happened.

So, basically, she kind of suggested that we take this to the attention of the supervisor, which I did. And I brought it to the attention to the supervisor and took the child to the supervisor, and she noticed – that's when I guess she noticed more things going on with him.

Q. Were you there when she noticed more things going on?

A. No.

Q. Okay. So let me back you up. Do you know what day this was?

A. The exact date, I don't. I want to say March, April, sometime during Spring.

Q. Okay.

A. I don't know the exact date.

Q. And how long had [L.P.] been in your class?

A. He hasn't been there very long. He had just started. Probably – probably two weeks, if that. Two, three weeks.

Q. Two or three weeks?

A. Maybe.

Q. And had you ever looked at [L.P.] prior to this date?

A. Well, yeah. I – well, yeah, I did. But it [239] was something – because we were always – we're supposed to do that – when the children come in, we're supposed to always observe them, look for different things, what's going on with them. I just noticed something white on his head. At first I thought it was

– I don't know – eczema or something. But it was chalk. It was chalk on his head.

Q. Was that that same day?

A. No, it wasn't.

Q. Do you know how close to that day it was?

A. It was probably a day or two before that.

Q. Okay.

A. Probably two days before that.

Q. And as you work, do you know who drops them off and picks them up each day?

A. Maybe mom. I think there were like – like turns. Probably dad one day –

Q. So is it fair to say that you don't know who dropped them off and picked them up every single day?

A. Not every single day, because they would alternate. They would take turns. It would be mom some days and dad some days. But I think, for the most part, mom would drop him and probably daddy pick him up. Since this day – it was different. I'm not [240] too sure. It could have been dad who dropped him off, I think.

Q. Okay. What are the hours that [L.P.] was in your classroom?

A. From 1:00 to 4:30.

Q. From 1:00 to 4:30?

A. Uh-huh.

Q. And did you make a statement with Cleveland police?

A. Yes.

Q. Okay. And do you know how soon after this occurrence that you made that statement?

A. Probably two, three days, maybe. I'm not sure. Probably two, three days.

Q. Okay. And if I showed you that statement, would it help you remember what date this all occurred?

A. It probably would help.

MS. DRISCOLL: Your Honor, may I approach?

THE COURT: You may.

MS. DRISCOLL: Thank you, Your Honor.

Q. Ms. Whitley, I'm showing you what's been marked as State's Exhibit Number 64. Can you take a [241] look at that, please? Does that refresh your recollection?

A. Yes.

Q. Do you know what day it was that you saw the marks?

A. It was that Wednesday, because – well, yeah. It was that Wednesday.

THE COURT: She asked, did you know the date.

THE WITNESS: The date?

THE COURT: That's – the question was, Do you know the date?

THE WITNESS: The 17th.

Q. The 17th of March?

A. Yes.

Q. Okay. And where is William Patrick Day School?

A. East 22nd and across the street from Community College Avenue.

Q. In Cleveland, Ohio?

A. Yes.

Q. Cuyahoga County?

A. Yes.

Q. And was [L.P.] present at William Patrick Day School the day before, on March 16th, 2010?

[242] A. Yes.

Q. And was it March 16th, 2010, when you inspected [L.P.] and saw chalk in his hair?

A. Yes.

Q. And did you see any red marks in his eye –

A. No.

Q. – or blue marks on his face –

A. No.

Q. – on March 16th?

A. No.

Q. And you said that his father would drop him off; is that true?

A. Yes.

Q. Do you see him here today?

A. Yes. I guess that's the gentleman over there.

Q. Can you describe what he's wearing?

THE COURT: You have to keep your voice up so the jury can hear you, please.

THE WITNESS: White shirt and a maroon tie.

MS. DRISCOLL: May the record reflect that she's identified the defendant?

THE COURT: The record may reflect that she identified the defendant in [243] court.

MS. DRISCOLL: Thank you, Your Honor.

Q. And what else did you do in response to seeing these marks on [L.P.]?

A. Again, I brought it to the attention of a co-teacher. We made a suggestion that Mrs. Cooper needs to know what's going on, and that's when she said to make the 696 call.

Q. Did you inquire to [L.P.] as to what happened to him?

A. I did. And the answer was, I don't know. I hurt myself. I fell. He wasn't really telling me exactly what happened.

Q. Okay. Ms. Whitley, I'm going to show you what's been marked as State's Exhibit 1. Can you identify that?

A. This is [L.P.], and the side of his face has a welt mark.

Q. Is that what you recall seeing that day?

A. Yes.

Q. I'm showing you what's been marked as State's Exhibit 53. Do you recognize that?

A. Yes.

Q. And what is that?

[244] A. It's a mark on – it looks like it's on the right side of his face too.

THE COURT: You got to keep your voice up. And you're identifying, for the record, a photograph. And then keep your voice up so the jury can hear you.

THE WITNESS: Marks on the right side of his face, lower.

Q. And is that what you observed on March 17th, 2010?

A. I observed more – I guess what caught me was the eye, the left side. It was red.

Q. I'm showing you what's been marked as State's Exhibit 25. Do you recognize that?

A. Yes.

Q. Is that a photograph of [L.P.]?

A. It is.

Q. And what do you see in that photograph? Are you okay, Ms. Whitley? Can you tell us what you see in that photograph?

A. Marks, welt marks.

Q. Welt marks?

A. Welt marks. Like marks, red welts from his face.

Q. Okay. And do you see anything in his eye in [245] that photo?

A. Bloodshot, like blood, bloodstained.

Q. Pardon?

A. Like a red bloodstain.

Q. Okay. And is that what you observed on March 17th, 2010?

A. Yes.

Q. Does that accurately depict what you observed on March 17th, 2010?

A. Yes.

Q. Okay. And are these marks what made you look at him more closely?

A. Yes.

Q. And where these marks on him on March 16th of 2010?

A. No. I don't recall it being on him March 16h. There was chalk on him, in his head.

Q. Okay. And who dropped him off on March 17th, 2010?

A. A gentleman. His dad, I guess.

Q. And is it the gentleman that you pointed out here today?

A. Yes.

Q. And is that the same gentleman who picked him up on March 16th, 2010, if you recall?

[246] A. Yes. Yeah. You know, he looks – yes. That's – he looks a little thicker.

Q. Did you know his father's name?

A. No. I never really knew dad's name. No.

Q. Okay. I'm showing you what's been marked as State's Exhibit 23. Do you recognize that?

A. Yes.

Q. And is that a photograph of [L.P.]?

A. Yes, it is.

Q. And what is in that photograph?

A. Again, the same marks, red marks, red bloodshot eye, left side of his face.

Q. And are those the marks that made you look at him more closely?

A. Yes.

Q. And are those the marks that made you call 696-KIDS?

A. Yes.

Q. And were those marks present on March 16th, 2010?

A. No.

Q. Now, you talked about his haircut. Did he not [247] have a haircut the day before?

A. He did. He did. I think that's when I noticed the chalk in it. I thought it was something else, like eczema or something. It was chalk. I talked to mom about it, and she said it was chalk.

Q. Okay. So was it mom that picked him up on the 16th?

A. On the 16th, it could have been mom who picked him up.

Q. Are you sure who picked him up on the 16th?

A. It could have been mom.

Q But it could have been him? It could have been mom?

A. I think it was mom, because we had the discussion with her that day, that he had – it was the day he got picked up, as a matter of fact. And she brushed it. It was chalk. It was mom who picked him up on the 16th.

Q. Okay. And then who dropped him off on the 17th?

A. Dad.

Q. And was that a normal thing for dad to drop him off?

A. Sometimes dad drops him off. Yes.

Q. Okay. And we talked about 696-KIDS. What is [248] 696-KIDS?

A. It's a number that you call if a child is in need for some sort of service, if the child is hurt, being physically abused, sexually abused, there's a number that we call to make sure everything's okay.

Q. And are you a mandatory reporter?

A. I am.

Q. What does that mean?

A. That means that by law I have to report what is going on when it comes to the safety of a child.

Q. And were you trained in this?

A. Yes.

Q. What kind of training did you receive?

A. We received first aid training, CPR, child abuse and neglect, things of that nature.

Q. And have you had to call 696-KIDS very often?

A. No. Not too often. No.

Q. You've been at William Patrick Day for nine years?

A. Yes.

Q. How many times do you think you've called?

A. Maybe twice. This is probably the second call. This is probably my second call.

Q. And you seem pretty emotional about this. Was there anything that stuck out on this day?

[249] A. He was somewhat shy and quiet, just not as talkative as usual. He just was kind of quiet.

Q. So he was different on the 17th?

A. A little different. Usually he's more active, playful. He was kind of quiet.

MS. DRISCOLL: Nothing further. Thank you, Your Honor.

THE COURT: Cross-examination, Mr. Morgan?

MR. MORGAN: Thank you, Your Honor.

* * *

BY MR. MORGAN:

Q. Good morning, Ms. Whitley.

A. Good morning.

Q. My name's Chuck Morgan. I'm the attorney for Darius Clark. I'm going to ask you some questions. Okay?

A. Yes.

Q. If at any time you don't understand, please stop me, and I'll rephrase it. Okay?

A. Okay.

Q. Now, you work for – it could be Council of Economic Opportunity in Greater Cleveland?

[250] A. Yes.

Q. You've been there for –

A. 15 years.

Q. 15 years? And at William Patrick Day for nine years, I think you said?

A. Yes.

Q. Are you the teacher or co-teacher or assistant? What is your title?

A. Assistant teacher.

Q. Assistant teacher?

A. Yeah.

Q. And who are you the assistant teacher to?

A. Ms. Jones.

Q. Okay. And that would be Debra Jones, correct?

A. Correct.

Q. Okay. What type of training do you have to get a job as an assistant teacher?

A. Well, we have to do – we have to go to school for it. I have my child development associate. I also have an associate's degree – associate of arts degree. And I'm still in school. So you have to go to school for that. You take early childhood classes for that.

Q. Okay. Something similar to maybe continuing education; you got to take something every couple of [251] years?

A. Correct. Yeah.

Q. Okay. And you are current with all of that?

A. I'm sorry? I didn't hear you.

Q. You are current with what your requirements are?

A. Yes, I am.

Q. How many children are in that – let me rephrase it. Back in March of this year, okay, about how many children were in that afternoon class?

A. We are enrolled – the enrollment is about 17 children. How many were in there that day? I'm not sure. It could have been 12, could have been 10.

Q. Up to 17?

A. Up to 17.

Q. It just depends on how many show up that day, right?

A. Exactly.

Q. Okay. So it could have been ten? It could have been 12? It could have been 17?

A. Yes.

Q. You just don't know for sure?

A. Yes.

Q. Do you have a sign-in log?

[252] A. We do have one.

Q. Okay. Let's talk about the sign-in log, how it's used. If I'm a parent and I want to bring my child there, okay, and let's say my client's – my child is enrolled in that class and I'm going to drop them off, what is the procedure that goes through to bring the child there? Do I get to walk in, hand my child –

A. There is a sign-in sheet there located directly in front of the parents as they walk inside the classroom, and they sign them in, the sign-in sheet. And we have attendance. And what we do is mark that child being

there, present or absent. A check is if they're there for the day. If it's an A, you're absent for that day.

Q. Okay. And then when the parent comes to pick them up, they also have to sign the child out?

A. Yes.

Q. Okay. Those logs, they're kept at William Patrick Day?

A. Yes.

Q. Okay. Did anybody from the prosecutor's office or the Cleveland Police Department ask you to bring in those logs within the last couple of days?

A. Yes.

[253] Q. Okay. And did you have you the opportunity to bring them with you?

A. No. Because I – we didn't have it. We didn't have those.

Q. You don't have them?

A. No.

Q. How long do you normally keep them?

A. I guess it would depend on the room arrangement. Probably once another school year starts up – probably six months.

Q. And do they destroy them after the school year?

A. I'm not sure, but we weren't able to locate the log.

Q. What did you do to attempt to locate them?

A. Well, we looked in some of the books where they would normally be kept, but –

Q. Ms. Driscoll asked you some questions about the 16th of March, and you told her that mom picked her up – picked up [L.P.], correct?

A. Yes.

Q. Okay. So that would have been approximately 4;30 on the 16th of March?

A. Around 4;30, 4:00. Could be 4:00 to 4:30. The latest pickups starts after 4:30, so around 4:30.

[254] Q. You are going from your memory on that; is that correct?

A. Correct.

Q. Oaky. But I believe you told the jury that you remember it was mom because she dusted off some chalk or whatever.

A. It was mom, that I remember.

Q. Okay. You're certain that mom was there on March 16th at 4:00, 4:30, something like that?

A. Right.

Q. You did not see my client on that day, correct?

A. Correct.

Q. Okay. Prior to March 17th of this year, had you seen my client either drop off or pick up [L.P.]?

A. Drop them off.

Q. Okay. You're certain of that?

A. And he picked them up.

Q. Okay. Debra Jones, when people are dropping children off or picking children up, does she have the same opportunity to view who's doing the drop-off and pickup?

MS DRISCOLL: Objection.

Q. If you know.

[255] THE COURT: If she knows, she may answer. It's cross-exam.

A. If she had that same opportunity? We both have. Yes.

Q. Okay.

A. On that particular day –

Q. Which day are we talking about?

A. The day of the occurrence.

Q. So the 17th?

A. The 17th, March 17th, dad was a little late picking up [L.P.].

Q. Do you know who dropped off that day?

A. Dad.

Q. Okay. Did you check the logs, or are you just going from memory?

A. Dad. It was dad.

Q. Okay. Now, you described, in your statement, welt marks?

A. Yes.

Q. Should I take that to be mean bruises?

A. Yeah. I would. Yes.

Q. And I believe also that you stated that [L.P.] was uncomfortable, correct?

A. Yes.

Q. Was he complaining about being any pain [256] that day?

A. He was just reserved, quiet, more than his usual self. He was being different from how he normally behaves.

Q. But did he make any statement: My arms hurts; my head hurts; my back hurts; my stomach hurts; anything like that?

A. I don't remember a conversation like that. I just remember what I saw, and why he was quiet, why he wouldn't eat.

Q. Well, you made a written statement to Detective Remington on the 19th of March, correct?

A. Yes.

Q. If he had said anything about "my arms hurts, my head hurts, my back hurts, my stomach hurts," would you have put that in that statement? Do you think that would have been important to put in that statement two days later?

A. If he had mentioned anything about any part of his body hurting, yes. Yeah.

Q. You would have been put it in, right?

A. Uh-huh.

Q. So if the statement doesn't include anything like that, can I, then, conclude – would it be fair for me to conclude that [L.P.] made no complaints [257] about pain for an arm, head, back, stomach, anything like that?

A. He made no complaints to me about it.

Q. Okay. When he was doing – when I say "he" – let me rephrase it. When [L.P.] was being asked questions at William Patrick Day on the 17th, was it in the classroom, or was it off in an office somewhere?

A. It was in the classroom, again, because there's better lighting. But it was aside from the other children, and that's when I kind of got the attention of the other teacher, Ms. Jones.

Q. And who was present when he was being – [L.P.] was being questioned?

A. Ms. Jones, myself, and – I think it was Ms. Jones and myself, actually, the one's attention – there was another teacher in there, but it was Ms. Jones and myself.

Q. Who was the other teacher?

A. It's Ms. Banks.

Q. Ms. Banks?

A. Uh-huh.

Q. Okay. When [L.P.] was initially questioned, he said that he fell, correct?

A. Yes.

[258] Q. And at some point, he said my client did it, right?

A. A Dee, I think he mentioned.

Q. He mentioned Dee did it, right?

A. Yes.

Q. "Dee did it" was one of three separate answers that he had given, though, right?

A. Okay.

MR. MORGAN: Do you have her statement?

MS. DRISCOLL: She has it.

Q. Can you take a look at the second page of your statement?

A. The second page?

Q. Yes.

MR. MORGAN: May I approach, Your Honor?

THE COURT: You may.

Q. That question and that answer, can you read that, please?

A. "What was [L.P.]'s demeanor" –

Q. Yes. That question.

A. – "the day that you discovered other marks on his body"?

Q. And your answer to that was?

[259] A. "Hesitant to talk, afraid to talk. He seemed uncomfortable. Maybe he seem afraid because he gave three answers."

Q. Okay. So he gave three separate answers?

A. Uh-huh.

Q. And out of those three, one of them was –

A. He said he fell. He said Dee did it. He said, I don't know.

Q. So three different answers?

A. Three different answers: I fell; Dee did it; I don't know.

Q. After mom picked up [L.P.] on March 16th at 4:00, 4;30 and until about 1:00 on the 17th when [L.P.] was dropped off, do you know where [L.P.] was during that time frame?

A. Can you repeat that?

Q. From the point that mom picked up [L.P.] on March 16th, 2010, at approximately 4:00, 4:30 in the afternoon, from that point up until approximately 1:00 when [L.P.] was dropped off on March 17th, 2010, at William Patrick Day School, for that period of about 21 hours, okay, do you know where [L.P.] was during those 21 hours?

A. No. After he was picked – after he was picked up on the 17th? No. After he was picked up? [260] No.

Q. Okay. So you weren't with him. You didn't see him. You don't know where he was –

A. After the day he was picked up, after the 17th, no. He didn't – he didn't continue to come to school. That was it. I didn't see him.

Q. No. I'm talking from the 1:00 on the 17th and going back to the 16th, just that period of time.

A. From 1:00 to 4:30, that was the time that I saw [L.P.].

Q. Okay. But I'm not talking about those hours. I'm talking about from the point mom picked him up on the 16th until my client dropped him off on the 17th.

A. Uh-huh.

Q. Okay. For those 21 hours – do you know which hours I'm referring to?

A. The ones you just mentioned.

Q. Yes.

A. I have – no. I don't know what happened to him.

Q. From 4:00 p.m. on March 16th, 2010, and going through until 1:00 on March 17th, 2010, you were not with [L.P.], correct?

A. 1:00 – I was with all the children during that time. On the 17th?

[261] Q. No. I don't know how else I can say it.

A. I don't understand what you're saying. You're asking me if I was with that child on the day of the incident – the day of the incident?

Q. No. I'm asking – yes. But prior to him being dropped off. Do you understand what I'm saying?

A. Before he was dropped off –

Q. Yes.

A. – was I with him? No.

Q. You weren't with him?

A. No, I wasn't.

Q. Okay. You don't know where he was, correct?

A. Correct.

Q. You don't know what time dad might have picked him up on the 16th or 17th, correct?

A. The 16th or 17th, dad was late picking him up, the 17th. So on the 16th, mom picked him up.

Q. Okay. But you don't know what time [L.P.] came in to being with my client on the 17th prior to my client dropping him off about 1:00 –

A. Not the exact time.

MR. MORGAN: Okay. Thank [262] you. One second, Your Honor.

THE COURT: You may.

MR. MORGAN: Thank you.

THE COURT: Any redirect?

MS. DRISCOLL: Just briefly.

* * *

REDIRECT EXAMINATION OF RAMONA WHITLEY

BY MS. DRISCOLL:

Q. Mr. Morgan was just asking you about between 4:30 p.m. on the 16th and 1:00 on the 17th. You weren't with [L.P.], right?

A. Right.

Q. But you can say something happened to [L.P.], correct?

A. Yes.

Q. And you can say that you were in Cleveland, Ohio when you saw him on the 16th?

A. Yes.

Q. And on the 16th, no bruises, no welt marks, nothing on his face, correct?

A. Correct.

Q. And on the 17th when dad dropped him off, you [263] noticed his eye, his face and everything, welt marks?

A. Yes.

Q. Correct?

A. Correct.

Q. And [L.P.] told you who did this, didn't he?

A. I was given – yes – three different answers.

Q. And what were those three different answers?

A. "I fell."

THE COURT: Counsel, that's already been asked and answered. If there's something new, you can ask it. She gave the three answers before. You just don't repeat things on redirect. If you have something new, we'll listen to it; but you don't repeat exactly what's already been asked. So move on to something else.

Q. Did he ultimately tell you who did this to him?

A. Dee

MS. DRISCOLL: Thank you. No further questions.

THE COURT: Any recross?

MR. MORGAN: Just very briefly.

[264]

* * *

RECROSS-EXAMINATION OF RAMONA WHITLEY

BY MR. MORGAN

Q. Ms. Driscoll asked, Did he tell you who did it? When he answered that question, were you pointing to a specific bruise or – when you – "it," what is "it"?

A. Who did this?

Q. No. Who did – who did –

A. Well, I was referring to the eye, because the eye is what caught –

Q. Okay.

A. Bloodshot. It was red. He had welts on his face.

Q. Okay. So that's what maybe [L.P.] was referring to also, correct?

A. Correct.

Q. So we don't know if he was referring to other bruises on his body or the mark on his face, to Dee, correct?

A. Correct. Face, head, the head – top of the head, the face, the eye.

Q. So when you were or when you were present and [L.P.] was being questioned "who did this," you were referring – it was being referred to the eyes?

A. Everything I saw up here. Dee.

[265] Q. Nothing down here, right?

A. I don't know about down there.

MR. MORGAN: Okay.

THE COURT: Any re-direct?

MS. DRISCOLL: No. Thank you, Your Honor.

THE COURT: You may step down, ma'am. State may call your next witness.

TESTIMONY OF DEBRA JONES

[265]

* * *

The STATE OF OHIO, to maintain the issues on its part to be maintained, called as a witness, DEBRA JONES, who, being first duly sworn, was examined and testified as follows:

THE COURT: Okay. You may take the witness stand right there, ma'am. You may proceed, Counsel.

* * *

DIRECT EXAMINATION OF DEBRA JONES

BY MS. KARKUTT:

Q. Ma'am, could you state your name and spell your last name for the record?

A. My name is Debra Jones, J-o-n-e-s.

Q. Ms. Jones, where are you employed?

[266] A. Council of Economic Opportunities. The center I work at is William Patrick Day.

Q. And how long have you been employed by that agency?

A. At least 15 years or more.

Q. How long have you been assigned to –

A. About 15.

Q. And of those 15 years, how long have you been assigned to the William Patrick Day School?

A. About maybe six years.

Q. And in what capacity do you work at the William Patrick Day School?

A. My occupation?

Q. Yes.

A. I'm a teacher, lead teacher, in the classroom.

Q. And what training and background, education, experience do you have to qualify you for that position?

A. I have two associate's degrees in education.

Q. And where are those degrees from?

A. Associate of Science and Associate of Arts.

Q. And where are those degrees from?

A. Tri-C Metro. And I also take classes at Cleveland State.

Q. Currently you do?

[267] A. Yeah. Ongoing.

Q. Ongoing?

A. Working on my bachelor's degree.

Q. And what are the ages of the children that you teach at the school?

A. Three- through five-year olds.

Q. And this is an all-day school?

A. No. Part-day. I'm a part-day teacher, a.m. and p.m. classes.

Q. And how many children are in each class that you teach?

A. We could have up to, like, 17.

Q. 17 in the morning and 17 in the afternoon?

A. Yes.

Q. Ms. Jones, I'd like it call your attention to the date of March 17th of 2010. Were you working on that day?

A. Yes, I was.

Q. And at that time, did you have a student in your afternoon class by the name of [L.P.]?

A. Yes.

Q. And how long had [L.P.] been a student at your school?

A. Not very long, maybe a week or two.

Q. And in that time frame, did he come to school [268] on a regular basis?

A. Yeah.

Q. And did you have an opportunity to observe who dropped him off each day?

A. Yes.

Q. And who was that?

A. On that particular day, I can't say who dropped him off.

Q. You didn't see who dropped him on off on the 17th?

A. Right.

Q. Prior to the 17th, did you have an opportunity to see who usually brought him to school?

A. Yeah. Sometimes we're in the lunchroom when some of the kids come in, or we'll – either Ms. Whitley or myself will see the parents, because they have to come in and sign in or say something to one of us.

Q. Okay. And to your knowledge from your observations on those days, week or two prior to the 17th of March, who would you see drop [L.P.] off at school?

A. I think on the first day I remember her and a fellow –

Q. And when you say "her," who are you referring [269] to?

A. His mom. Because we be eating in the lunchroom when they came in. And they seemed to be nice people, but – I think I remember his mother, because she always looked at me. She always looked at me or hi every time she dropped him off. Even if I'm busy, she'd still look at me, and I always looked back at her.

Q. And would she sign him in as well?

A. Yeah. Sometimes we have a line. You got to wait and sign in.

Q. And do you keep those log sheets at your school?

A. Yeah. We keep them like the whole year, but I don't have that form in particular.

Q. Have you had an opportunity to look at the school to see if you could locate those records?

A. Yeah.

Q. And they're not there?

A. No.

Q. You usually keep them for a year?

A. Yeah. I'm one of those people that keep everything. So they – some take out some things and toss them. I like to keep things for things like this.

[270] Q. And you looked for them, and you can't locate them; is that correct?

A. Right.

Q. Now, you have another teacher that assists you in your classroom, is that correct?

A. Uh-huh.

Q. And her name is Ramona Whitley?

A. Yes.

Q. On March 17th, did Ramona Whitley get your attention in any way regarding [L.P.]?

A. Uh-huh.

Q. And once she got your attention, what did you do?

A. Well, I turned around and looked too. But I said, He needs to go to Ms. Cooper, my supervisor. After I looked at him, I said, you know, I'm going to take him to Ms. Cooper.

Q. And what did you see when you looked at [L.P.] that made you say, Hey, I better get my supervisor, Ms. Cooper, involved?

A. His eye. It looked red on the side. And I'd seen something else. I don't want to alarm him and, you know, make him feel bad. That's when I took him out of the room too and took him to her. I seen some signs of redness, I think around his neck or [271] somewhere.

Q. So you took him out of the classroom; is that right?

A. Yeah.

Q. And when you took him to Ms. Cooper, what kind of room is that?

A. It's an office.

Q. Okay. And who was in that office?

A. Just Ms. Cooper. You know, I didn't want to embarrass him in front of the kids or alarm anybody, so I just took him to the office.

Q. And who went into Ms. Cooper's office with yourself and [L.P.]?

A. That was it. Just us two.

Q. And what about Ms. Whitley, was she there as well?

A. I don't think so. She was still with the kids. Somebody had to stay with the children.

Q. Okay. When you first noticed the eye and you said some other marks on [L.P.]'s neck; is that correct?

A. Uh-huh.

Q. Did you have a conversation with [L.P.] at that point?

[272] A. Yeah, I did.

Q. And how did that conversation go?

A. I just said, Who did this? What happened to you?

Q. And when you said "what happened to you," did he give you an answer?

A. Yeah.

Q. What did he say?

A. He seemed kind of bewildered. He said something like, Dee, Dee.

Q. And did you know that meant?

A. Actually, no, I didn't know what that meant.

Q. Did he say anything else that happened to him?

A. No. Because he was kind of quiet, like – but he was just starting to talk to the other kids and everything.

Q. And you had an opportunity to observe his demeanor in the weeks prior to March 17th, correct?

A. Uh-huh.

Q. And was it any different on March 17th than it was on the previous days when he came to your school?

A. No. He was kind of like – I said, he was kind of quiet, like – but I was trying to get him to talk about it. But I noticed him, around that time, talking to kids. Like that time and the time before [273] that, he was talking in the lunchroom to the kids at the table. And I said, Finally he's talking at the table with the

kids. We always take observations and noticed he was connecting.

Q. Now, when he told you Dee did it, what were you referring to when you were talking to [L.P.]?

A. Can you repeat that?

Q. [L.P.] told you "Dee did it," correct?

A. Yeah.

Q. And when you asked him what happened, what were you referring to?

A. I just – I repeated his words back. I just said, What did you say? Dee? Dee did this? Because he didn't say a name. He said Dee. I said, Oh, Dee.

Q. What else did you ask [L.P.] at that point in time, if you recall?

A. Yeah. It was a while now. I don't know. I just asked, Did Dee do this, and who is Dee? I asked him was he big or little, because I wanted to know was he talking about another child, because sometimes they'll say a brother or a sister hit him or somebody.

Q. Okay.

A. So I wanted to – not trying to find out. I just wanted to understand him clearly. And I said, [274] Is he big or little? And he didn't talk a lot. So I said, Is he big or little?

Q. Now, you just made a motion with your hands, you now.

A. Yeah.

Q. You said you asked [L.P.], Is Dee big or little. Is that what you asked him?

A. Uh-huh.

Q. And can you show us what motion you made with you hand when you had –

A. I made it like this, just like – Is he big, or is he little (indicating)?

Q Is he little, like up here (indicating)? And for the record, my arm –

A. I said, Is he little, or is he big?

Q. Okay.

A. And, Who's Dee?

Q. And when you say "little," is it fair to say you had your arm close to the ground?

A. I don't know. Just middle ways.

Q. Okay.

A. I was just trying to get a better understanding of who it was, you know. I do that all the time.

Q. And when you said "big," did your arm go over [275] your head?

A. It went up. It went up. Big or little?

Q. And what was [L.P.]'s response when you asked, Is Dee big or little?

A. I don't know. He kept looking kind of bewildered.

Q. What do you mean by "bewildered"?

A. Out. Staring out. And I was asking him – he almost looked uncertain, but he said, Dee. So I guess that's all I can get out of him right now. I said, I'll take him to the office. That's what I'm going to do.

Q. Okay. And when you said to him, Who did this, can you tell me what "this" meant?

A. And I didn't want, again, to alarm him; and I didn't want to make him feel bad. I just asked hi, Who did this?

Q. And did you point to any of his body parts when you asked him that?

A. I'm not sure about that part. I don't know if I said "to your eye," I never said anything about – because I didn't look all over his body. I didn't do that in front of the kids. I just said, Who did this? Who did that to you?

Q. And he said, Dee did it?

[276] A. Uh-huh.

Q. And he described Dee as being big, correct?

A. He didn't say that Dee was big. He might have shook his head a little bit, you know.

Q. Ms. Jones, do you remember after this incident occurred that you went – there was a time that came that you went and met with the detective from the Cleveland Police Department?

A. Uh-huh.

Q. And do you remember how long after March 17th that was?

A. Not too long after.

Q. And on that date, did you give him a statement?

A. Yes.

Q. And in that statement, did you include all of the observations and conversations that you had with [L.P.] on March 17th?

A. Uh-huh.

Q. And if you had an opportunity to review that statement, would you be able to tell us what day it was taken?

A. Yes.

Q. And would it refresh your recollection to the conversations that you had with [L.P.] about his [277] injuries?

A. Uh-huh.

MS. KARKUTT: May I approach, Your Honor?

THE COURT: You may.

Q. Ms. Jones, I'm showing you what's been marked for identification purposes as State's Exhibit 65. Do you recognize that?

A. Yes.

Q. And what is it?

A. It's a statement taken from me, that I remember that day.

Q. What date was that statement taken?

A. On the 19th, March the 19th.

Q. 2010?

A. 2010.

Q. That's just two days after you observed [L.P.], correct?

A. Yes.

Q. Does that refresh your recollection as to your conversation with [L.P.] about his injuries?

A. Uh-huh.

Q. What did he tell you about what happened to him?

A. Oh, yeah. I did say this. Yeah. Again, I'm [278] reading my statement. But, again, he didn't have a lot of words; and I noticed that in the beginning. You kind of just talk with them. So I kind of – like I said, I asked him. He didn't go into detail on what happened.

Q. Did you ask him anything about any type of discipline situation, like a spanking or a whooping?

A. Yeah. He said – he said "Dee."

Q. He said Dee what?

A. He answered. I said, Well, who is Dee? Because I didn't know if it was a child or if it was a grownup or whatever. And he said, Dee is big.

Q. And is that when you went through the hand motions with him?

A. Yeah. Yeah.

Q. Now, after you got that information, is that when you took him to Ms. Cooper's office?

A. Yeah.

Q. And once you got him to Ms. Cooper's office, what happened?

A. Well, Ms. Cooper asked who actually seen him, you know, first. And she said, Whoever seen him first got to make the call.

[279] Q. And when you're talking about a call, what call are you referring to?

A. 696-KIDS.

Q. And that's to report any observations of abuse?

A. Uh-huh.

Q. And who was the person who first made these observations?

A. Ms. Whitley, because she had the boys before we came into the room; and I had the girls.

Q. So she went ahead and made that call?

A. Right.

Q. Once you were in Ms. Cooper's office, was there any closer examination of [L.P.] with respect to any marks or injuries that may have been observed?

A. Yeah. Ms. Cooper pulled up his shirt, and she just told me he had a nice shirt on. And she said, Can I see your shirt – and seen some more marks on him.

Q. You saw some marks?

A. Yeah.

Q. Can you describe what you saw once [L.P.]'s shirt was pulled up?

A. Some marks on his back.

Q. What did those marks look like?

[280] A. I just remember kind of reddish marks.

Q. And any marks anywhere else once the shirt was lifted up that you recall?

A. No. She didn't – I don't know if she pulled – we didn't want to embarrass him. I don't think she pulled down his pants or anything like that, but we saw enough to make that call.

Q. Okay. And you saw enough to make the call, correct?

A. We saw enough to make the call.

Q. Okay. Now, was [L.P.] in your class on March 16th of 2010?

A. I believe so.

Q. And did you have an opportunity to observe his head and neck and face on that day?

A. On that date that this took place?

Q. On the 16th, the day before you called 696-KIDS.

A. Right. Yeah. Because I noticed he had something red in his head. I didn't know what it was because it was on his hair.

Q. Okay.

A. And I wasn't sure, was it – what was going on with his head. So I asked the mother. I remember asking her what was going on with his head. I said, [281] What is that on his head, you know? And she said nothing. And she walked over there, and she touched his head. I think she brushed it. She said, Oh, that's chalk or something like that. And she was

telling whoever she was talking to, That's chalk. You know, they're saying something's wrong with him.

I just said, No. I just need to know that was chalk on his head.

Q. So on the 17th it was just chalk. Did it just brush – wipe right out of his head?

A. Yeah. But I remember her touching his head. And she said, I'll take care of that. That's chalk.

Q. So you touched his head on the 16th?

A. She did.

Q. She did.

A. The mother did. But I seen her, though. She was standing right there.

Q. Okay. And you had on opportunity to look closely at [L.P.]'s head that day; is that right – on the 16th?

A. Uh-huh.

Q. Did you see any welt marks on his head or bruising on his face on the 16th?

A. No. I don't think so.

Q. Did you see any redness in his eyes on the [282] 16th?

A. Uh-uh.

Q. And you had an opportunity to observe him that day? Yes?

A. Uh-huh.

Q. And did he look different on the 17th of March?

A. Yeah.

Q. And how did he look different?

A. That's the red mark, because Ms. Whitley made me look – because I was going to do circle time with the kids, and I said, What's going on? I came back to see, and that's when I looked over.

MS. KARKUTT: May I approach?

THE COURT: You may.

Q. Ms. Jones, I'm showing you what's been marked for identification purposes as State's Exhibit 25. Do you recognize this?

A. Yeah.

Q. You do?

A. Yes.

Q. And what is State's Exhibit 25?

A. It's a mark on his face.

Q. It's a photograph, isn't it?

A. Yes.

[283] Q. And who does that photograph depict?

A. [L.P.].

Q. And what about [L.P.] is depicted in that photograph?

A. He has some red in his eye and on his cheek.

Q. And is that a fair and accurate depiction of how you viewed [L.P.] on March 17th, 2010?

A. I think so. I thought he had more red in his eye, but, yeah.

Q. And is that what called your attention to his face and head on that day?

A. Uh-huh.

Q. Is that a "yes"?

A. Yes, it is.

Q. Okay. I'm showing you State's Exhibit 24. Do you recognize that?

A. Yeah.

Q. Is that also a photograph of [L.P.]?

A. Uh-huh.

Q. And you can you tell me what's depicted about [L.P.] in that photo?

A. There's some red underneath his eye.

Q. And did you observe that on March 17th of 2010?

A. Yes.

[284] Q. Does that accurately depict how he appeared to you?

A. Uh-huh.

Q. I'm showing you State's Exhibit 26. Do you recognize that?

A. Now that; no.

Q. You don't recognize –

A. I seen his neck.

Q. Okay. Is this a photograph depicting [L.P.]'s neck?

THE COURT: You got to keep you voice up so the jurors can hear.

A. I thought I saw something red on his neck, somewhere up in here.

Q. Do you recall seeing what's depicted in State's Exhibit 26, that photograph?

A. Yeah.

Q. And the marks that you see there depicted in State's Exhibit 24, 25, and 26, did you see those on [L.P.] on March 16th of 2010?

A. Uh-huh.

Q. On the 16th, those marks were there when you looked at him the day before you called 696-KIDS?

A. No. Those marks weren't were there. I didn't see them.

[285] Q. What day did you see those marks?

A. On the date that we called. I just remember – whatever date is on here.

Q. That was on March 17th, right?

A. Right, the 17th.

Q. And then once you took [L.P.] into Ms. Cooper's room, you had an opportunity to observe what was under his shirt; is that correct?

A. Uh-huh.

Q. You described observing some red marks on his back; is that fair to say?

A. Uh-huh.

Q. I'm showing you State's Exhibit 30. Do you recognize that?

A. Yeah.

Q. And what is depicted here in State's Exhibit 30?

A. Marks on his back.

Q. On [L.P.]'s back?

A. Yeah.

Q. That's a photograph depicting those marks? Yes or no?

A. Yes.

Q. Are those the same marks you observed on March 17th?

[286] A. Yes.

Q. I'm showing you State's Exhibit 54.

A. Go ahead.

Q. Do you recognize that?

A. Yes.

Q. And what is depicted in State's Exhibit 54?

A. Those are marks too, but they look like these. Yeah.

Q. One photograph is bigger – they're both photographs, correct?

A. Yeah.

Q. And one's bigger than the other?

A. Uh-huh.

Q. And is that a fair and accurate depiction of what you observed on [L.P.]'s back –

A. Yeah.

Q. – on the 17th of March?

A. Yeah. I'm pretty sure. He couldn't – he didn't talk a lot. He couldn't express himself. So I just want to be fair about it. He didn't explain anything to me. He just answered.

Q. He didn't expand, but did he tell you who had done this to him?

A. Yeah. That day, before I came into Ms. Cooper's office, yeah.

[287] Q. And he said Dee, right?

A. Yeah.

Q. Did you have any idea who Dee was?

A. No.

Q. Ms. Jones, do you recall who picked up [L.P.] from school on March 17th?

A. No.

Q. No? Were you present for when he was picked up from school?

A. No. No.

Q. Okay.

A. I think he went to Ms. Cooper's office. He never came back in there with us.

Q. And you indicated –

A. Or I don't' know who picked him up that day.

Q. You don't know who picked him up?

A. No. Because the – I think the child services or somebody was there. We didn't see him leave

Q. You didn't see him leave?

A. (Witness shakes head.)

MS. KARKUTT: Thank you. I have nothing further.

THE COURT: We'll take our morning recess at this time before Mr. Morgan [288] starts his cross. During the morning recess, do not discuss the case with anymore or permit anybody to discuss the case with you. We'll be in recess for approximately 10 to 15 minutes.

Everybody rise while the jury leaves the courtroom, please.

(Thereupon, a recess was had.)

* * *

THE COURT: I'm sorry for the delay folks, but it was beyond my control. That's all I can tell you. And it wasn't the fault of counsel, either.

Anyway, the witness may resume the witness stand.

Mr. Morgan, for your cross-examination.

MR. MORGAN: Thank you, Your Honor.

* * *

CROSS-EXAMINATION OF DEBRA JONES

BY MR. MORGAN:

Q. Good afternoon, Ms. Jones. How are you doing?

A. Okay.

Q. Okay. I'm Chuck Morgan. I'm the attorney for [289] Mr. Clark. I'm going to ask you some questions. If you don't understand a question, please stop me. Okay?

A. Yes.

Q. You are a teacher at William Patrick Day School?

A. Yes.

Q. Okay. And, Ms. Whitley, who testified before you is your assistant, correct?

A. Yes.

Q. And she's been your assistant for the last several years, correct?

A. Uh-huh.

Q. Up to 17 kids in the class?

A. It can have up to 17. Yeah.

Q. On March 16th or March 17th of this year, do you know how many kids were in your class?

A. No. I couldn't tell on that particular day?

Q. The sign-in procedure, when a parent is dropping off their child, can you briefly describe and explain that sign-in system that you have there for the parents?

A. They usually – whoever brings them in signs them in and puts the time down, whenever they enter the classroom, as well as – that's all.

[290] Q. So basically, you cannot have a child there unless the parent's signed them in?

A. Right. Right.

Q. Okay. The same for when a child leaves; a parent has to sign?

A. Yes.

Q. And you have those logs. I think you said you keep them for about a year, correct?

A. Yeah.

Q. And those logs will tell you who actually dropped off and who picked up on a particular day?

A. Yes.

Q. The prosecutors asked you to bring in those logs from March 16th and March 17th of this year?

A. Yes, sir. Yes.

Q. Okay. You made an effort to try to find them, correct?

A. Yeah. I immediately went back to where we usually keep them, and I went to look in the log to see if I could find that date or March, period.

Q. And you were unable to find them?

A. Right.

Q. Were unable to locate those records?

A. Right.

Q. And it's within a year. But for whatever [291] reason –

A. Right. We usually keep them, but we did some cleaning and all. That's why they're not there. Usually I would have something like that.

Q. Okay.

A. This year we did some extra cleaning, and that's why they're not there.

Q. And if you had them and you brought them in, you could say on March 16th – you'd be able to say for certain who dropped him off and picked him up right?

A. No. On that day? I didn't –

Q. No. I'm saying if you had those logs.

A. Yeah. Yeah. Because they'll have their name up there.

Q. Ms. Whitley testified that she was certain, on March 16th, that mom picked up [L.P.]. You can't dispute that, correct?

THE COURT: I think she said she didn't know.

Q. Okay. You don't know? Okay. Do you still have that statement of yours in front of you?

A. Yes, I do.

Q. Is that still up there?

[292] A. Uh-huh.

MR. MORGAN: May I approach, Your Honor?

THE COURT: You may.

Q. [L.P.] was in the afternoon classes, correct?

A. Yes, he was.

Q. Right there, that question, "Who usually picks him up," what was your answer?

A. I said his mother.

Q. Okay. And then going down a couple, "What day was the call made"? And your answer was, "Um, Wednesday the 17th of March," correct?

A. Uh-huh.

Q. Okay. And the next question right after we talked about the 17th of March was, "Who dropped [L.P.] off that day"? And your answer was?

A. "Ramona saw the dad bring him in."

Q. The question right after that was, "Was that the first time you heard of the dad bringing [L.P.] into school"? And what was your answer?

A. I said yeah. Because she told me – because I said, Oh, the father, he brought them in today.

Q. From that, can we conclude that you hadn't seen the father before the 17th of March?

A. I'm not sure. I'm not going to say yes or no. [293] On the first day that that started, I did see – they seemed like very nice people. They came a little late. It was a guy and the mommy. But I'm not – I didn't look at him a lot. But I remember the personality, because they were talking to me. They were kind of late, and I was telling them what to do. And I was in the lunchroom.

Q. But what we read, the question and the answer, that was on your statement, correct?

A. Yeah.

Q. And you made that statement on March 19th –

A. Uh-huh.

Q. – of this year, about two days after the 17th, correct?

A. Uh-huh.

Q. And you signed that statement after you reviewed it, correct?

A. Yeah.

Q. Okay. Now, going down a little bit further, you answer, I seen bruises on his face and by his ear and by his eye. I saw red in the eye. That's what I first saw. When we took him in later, that's when I [294] saw bruises on the rest of his body, back and neck.

So, from that, can I conclude that you looked at him in the classroom, and then a period of time later you took him somewhere else at William –

A. Yes.

Q. – at the day school, correct?

A. Yes.

Q. Okay. How much longer was it before you took him into the other room and saw the other bruises?

A. About – I don't know. Three, five minutes or something. Everything was happening so fast.

Q. The next line of your statement is, What did you do after you saw the bruises on his face? Your answer was, I spoke to him for a few minutes and asked him what happened, right? Okay. Was that your answer?

A. Yeah.

Q. Okay. And then you go further to say, I asked him, did he get in a fight with somebody or did he get a spanking? He said Dee. Now, when you were asking him that question, you're only referring –

A. Right.

Q – to the bruises and marks on his face, [295] correct?

A. Uh-huh.

Q. Because at that point, you hadn't taken him to the other room, right?

A. Right.

Q. Okay. I asked, Who is Dee. He wouldn't answer. So I said, Is Dee big? And I raised my hand or little and lowered my hand. [L.P.] looked up at the ceiling and said, He's big.

A. Uh-huh.

Q. Okay?

A. Uh-huh.

Q. Now, when he looked blank, was that in response to your question of – you asked him if Dee spanked you or hit you, right?

A. Yes.

Q. Okay.

A. But in all fairness to everybody, my honest opinion –

Q. Let me ask the questions. Okay?

A. Sorry.

[296] Q. Sorry to cut you off. I got to do my job. Okay?

A. Uh-huh.

Q. You were talking about spanking of hitting, and he said "Dee," right?

A. Yeah.

Q. Do we know if [L.P.] was referring to a hit or a spank when he said "Dee"?

A. No. That's why I said he looked kind of bewildered. I'm not sure.

Q. Pardon?

A. I don't' know. He looked just kind of – I don't know. I was trying to make sure he understood what I was saying.

Q. You're not sure if he understood?

A. Well – yeah, I'm not sure if he – but he answered. I don't know if –

Q. He answered "Dee," but you're not sure if that answer was responsive to your question? Is that what you're saying?

A. If I made a comprehension part? That was part of what I was trying to say.

Q. Well, you had the opportunity to be with [L.P.] for a couple of weeks before the 17th of March, right?

[297] A. Uh-huh.

Q. Okay. You had the opportunity to observe hi, right?

A. Uh-huh.

Q. You talked with him and all that?

A. Uh-huh.

Q. And is it your testimony today and, you know, after you called him bewildered and a blank stare, that you weren't sure if he comprehended what the questions were?

A. Yeah.

Q. Okay.

A. I guess.

Q. You guess, or you're not sure if he comprehended?

A. I'm not sure, because of the comprehension.

Q. I'm not trying to put words in your mouth.

A. I know. I know. And I'm just trying to be honest about that comprehension.

Q. Okay. But you knew [L.P.], right?

A. Yeah.

Q. And having the benefit of knowing him, you're not sure if he understood the questions, right?

A. Yeah. I'm being honest about that. Yeah.

Q. You're being honest about it. Just so I'm [298] clear, it's your testimony that you're not certain he understood the question, right?

A. Yeah. I was trying not to put words in his mouth, but he wasn't, you know, talking much. That's why I had to say a few things.

Q. You described him as a blank stare, bewildered. I think you used that word. And now I think you're telling the jury you're not certain. You can't say if he understood the question, right? Is that a fair statement?

A. Comprehension.

Q. Is it fair to tell the jury you don't believe that – or you're not certain he understood the question?

MS. KARKUTT: Objection, Your Honor.

THE COURT: Overruled.

A. I think he understood, but there's a question in my head.

Q. There's a question in your head after having the opportunity to observe him and be with him for a couple of weeks, right?

A. Yeah. Because I always talk directly to him to talk to him.

MR. MORGAN: Thank you.

[299] THE COURT: Any redirect?

MR. KARKUTT: Briefly, Your Honor.

* * *

REDIRECT EXAMINATION OF DEBRA JONES

BY MS. KARKUTT:

Q. Ms. Jones, you deal with three-. four-, five-year olds on a daily basis, correct?

A. Correct.

Q. And you have conversations with them every day at work?

A. Uh-huh.

Q. And do they talk with you and engage you in conversation?

A. All the time.

Q. All the time?

A. Yeah.

Q. Okay. And are you able to make a calculation or a judgment based on those conversations that the person you're talking to is understanding what you're saying?

A. Uh-huh.

Q. You are? And what kind of things do you look for to determine if someone's understanding, one of these little kids, if they're understanding what it [300] is you're saying?

A. That's why we test the kids every 30 days. We give them time and –

Q. You didn't have that with [L.P.], did you?

A. No. I didn't get to do that.

Q. But aside from those type of assessments, when you sit down with a three-year old and you have a conversation, on your own observations, what do you

look for to determine if they know what you're talking about?

A. Just giving them – asking them just simple open-ended questions or seeing if they just understand me or can they comprehend.

Q. And how do you make that assessment? If they respond to what you're asking, if that response makes sense?

A. Yeah. But sometimes – all kids don't talk sometimes. And I know body language – everybody don't talk.

Q. What type of body language do you look for?

A. I just watch their facial expressions sometimes. Because sometimes they'll ask me something, and they'll look at me, and they know they want something. So I ask them what they want or need, and then – I usually get really, really close [301] to all the kids.

Q. And when you talked to [L.P.] and you asked what happened to him, correct?

A. Uh-huh.

Q. Was he responsive to you?

A. Yeah. But I was getting to know him. But he did say "Dee."

Q. He did say "Dee"?

A. Yeah.

Q. And in response to what question? And you can refer to your statement, if you wish.

A. When I asked him. I remember when I asked him, Who did this to you.

Q. And he was response to you, yes or no?

A. Yeah. He was responsive and looking around.

Q. Well, what was that response, Ms. Jones?

A. He said "Dee."

Q. He said "Dee"?

A. He said "Dee."

Q. Okay. Now, defense counsel, on cross-examination, went through that whole paragraph, about one answer; is that right? And he went through that question by question and line by line of your answer; is that correct?

A. Yes.

[302] Q. And isn't it fair to say that when you went through line by line of your answer he left one line out, didn't he, very last line of that long answer paragraph?

A. Yeah.

Q. And you weren't able to – he didn't ask you about that part of the answer. What is that part of that answer to that question?

A. "We had looked at him the day before, that he didn't have that. I remember he had chalk on him on the day before."

Q. and when you say that he didn't have that, "that" is what?

A. He didn't have the eye – I don't think he had the red, because I looked at him.

Q. He didn't have those marks that you observed, correct?

A. Right.

MS. KARKUTT: One moment.

THE COURT: You may.

MS. KARKUTT: I have nothing further.

THE COURT: Any recross-examination?

* * *

[303]

RECROSS-EXAMINATION OF DEBRA JONES

BY MR. MORGAN:

Q. Ms. Karkutt's last question that you were talking about something about an eye, and she said he didn't have all that. Your answer was about the eye, though, right?

A. No. Well, he had red on his neck too – eye and the neck. That's what I remember.

Q. She asked you some questions about observing body language and all that. Do you remember those questions?

A. Uh-huh.

Q. When you were answering my questions regarding whether he comprehended everything, you took into consideration his body language on that day when you gave me that answer, correct?

A. Yeah.

MR. MORGAN: Okay. Thank you.

THE COURT: Any re-direct?

MS. KARKUTT: No, Your Honor.

THE COURT: Okay. You may step down. I think your next witness is for 1:30; is that correct?

TESTIMONY OF
SARAH BOLOG

[464]

* * *

(Thereupon, the following proceedings were had in open court in the presence of the jury.)

* * *

THE COURT: State will call your next witness.

MS. DRISCOLL: Thank you, Your Honor. Sarah Bolog.

* * *

The STATE OF OHIO, to maintain the issues on its part to be maintained, called as a witness, SARAH BOLOG, who, being first duly sworn, was examined and testified as follows:

THE COURT: You may proceed.

MS. DRISCOLL: Thank you, Your Honor.

* * *

DIRECT EXAMINATION OF
SARAH BOLOG

BY MS. DRISCOLL:

Q. Could you please state your name for the record?

A. Sarah Bolog.

[465] Q. And spell it.

A. B-o-l-o-g.

Q. Are you currently employed?

A. Yes, I am.

Q. Where?

A. Cuyahoga County Department of Children & Family Services.

THE COURT: Excuse me. What is your entire name?

THE WITNESS: Sarah Bolog.

THE COURT: And you last name is spelled how?

THE WITNESS: B-o-l-o-g.

THE COURT: Okay. Thank you.

Q. Can you pull the microphone up so we can hear you? Is it on?

THE COURT: It is.

A. Yes.

Q. All right. So you work for Children & Family Services?

A. Yes.

Q. How long have you been employed with Children & Family Services?

A. Next month will be my ten-year anniversary.

[466] Q. And what are your duties?

A. I'm currently in the investigative part of it. I take the cases from the 696 hotline and investigate them for child abuse and neglect.

Q. And what does the investigation encompass?

A. I go out. I make contact with the alleged child victims, the family, the caregivers, the alleged perpetrators. I gather information to determine if, according to the Ohio Revised Code, there is substantial evidence for child abuse or neglect or dependency issues.

Q. And what is the purpose of investigating and meeting with all of these various people?

A. Bottom line, we are charged with making sure that the minors in Cuyahoga County are safe and have stable provisions for their basic needs.

Q. So safety for the children?

A. Yes.

Q. Okay. And how long have you been an investigator with the State of Ohio?

A. I coming up on, I want to say, two and a half years, three years. I did our ongoing case services for about eight and a half.

Q. And then switched over to the investigation?

A. Yes.

[467] Q. How many investigations have you conducted?

A. Hundreds. I honestly couldn't tell you. We average anywhere from about a dozen new cases a month upwards to – some months, if it's a large

volume, 20, 30 cases a month. So times two years, I'd say a couple hundred.

Q. Okay. Bringing your attention to March 17th, 2010.

A. Yes.

Q. Did you learn of an investigation of [L.P.]?

A. Yes, I did.

Q. Okay. And were you involved in this investigation at that time?

A. Yes, I was.

Q. how did you become involved?

A. It happened by circumstance that I was working on another case later that evening. My supervisor knew that I was still in the work area, so she contacted me on my cell phone and asked if I'd be willing to try what we call a second attempt.

Another worker had attempted to see the family earlier in the day. And she was wondering if – this was after work hours – maybe if I stopped by I'd be able to make contact. So that's how I first became [468] involved.

Q. And what did you understand you were checking on?

A. I understood that the call initially came into the 696-KIDS hotline, and my coworker was initially sent out because a daycare had noticed a loop-shaped mark on a child that attended that daycare and had contacted the hotline regarding allegations of physical abuse.

Q. Okay. And do you know if your coworker's interview or investigation was successful at the daycare?

A. Her was successful at the daycare but not successful at the family home in trying to meet with the mother.

Q. Do you recall where the family home was?

A. It was in the Cedar Central Project. I forget if it was on the Cedar side or the Central side.

Q. And did you go out to that area?

A. Yes, I did. On March 17th, I had left the Cleveland Heights area; and I went to Third District Police on Chester, and I had a police escort – I want to say probably around 8 p.m. that I took Third District police and went to the family home.

And when I knocked on the door and when the [469] police knocked on the door, no one came to the door. But we have a standard – it's like an informational letter that the investigators – we put it in the family door or the family mailbox when we come out to the home, letting them know that a DCF worker's been to the home and they need to please contact us to schedule a visit. My coworker's letter was still in the door, and then I also left a second one

Q. Okay. From there, what did you do?

A. From there, I noted my attempts in our computer system and then went home for the evening. And I also tried the family home again the next morning, and both my letter and my coworker's letters

were still in the door. And from there, my supervisor assigned me the case for the rest of investigation.

Q. And what did you do for your investigation?

A. That morning, I did use the last known phone number, and I did check the emergency contact for the daycare. And I called mother several times on last known phone number for her. I did speak with her on the phone that morning.

While doing that, I did follow our agency procedures, and I scheduled what's called a staffing, which is an internal meeting that we have that we sit [470] down with the family and any service providers, the social worker, supervisor. And from there, we make a recommendation; and sometimes those recommendations result in a legal filing; sometimes they don't. But it's a way that we can officially have a plan for a case. So I was calling mother on the phone as well as scheduling a staffing for that afternoon.

Q. At this time, who did you understand this child to be with?

A. It was unclear if the children – or specifically [L.P.], if he was with his mother or his mother's paramour, Mr. Clark.

Q. Who did the agency last know him to be –

A. The agency last saw him with Mr. Clark.

Q. At that time, did you know how many children you were dealing with?

A. We only knew, from looking at our case history and then also –referencing the welfare system, that

there were two minor children, but only [L.P.] had been viewed the day before.

Q. Okay. So what did you do?

A. From there, like I said, I was talking to mom. I was calling her on the cell phone. I did have conversations with her on the telephone, but I was unable to get her to agree to meet with me.

[471] Q. Who is mom?

A. Mom's [T.T.].

Q. And what is mom saying to you?

A. When I was calling her and I identified myself, the agency, and I told her that there was concerns regarding child abuse and that we had concerns that there was marks on [L.P.], that there as a loop-shaped mark on his face that was indicative of child abuse. And from there, mom assured me that she had a falling-out with the daycare and that the daycare was making this up because they didn't' like here, and it was a personal attack.

And I explained that it could all be cleared up if I could just speak with her and see the child. And from there, she told me that she was unable to visit with me, that he didn't have any marks on him, that she was getting ready to take him to the clinic because he had pink eye. And I asked her which clinic, and she said the Women and Health, and that's over a Metro Hospital. And I'm familiar with the Women and Children's Pavilion, so I asked her if it was 3 or 2, and she said 2.

And so I asked her if she'd be willing to come to a staffing, and she said she wasn't able to because she was going to the clinic because he had [472] pink eye. So at this time, I offered to give her a ride. I was like, If I meet you over at the clinic and I give you a ride, would this make you – and she said yes, that she would come to a staffing.

So when I got off the phone with mom, I did follow up, and I called MetroHealth Department of Social Work. And I have the child – actually both children and mother – what we call – flagged in the computer system, which is where if DCF has serious concerns of abuse or neglect or dependency, we can contact the area hospitals and ask for a child or a parent to be flagged in their computer system, meaning once that person – once their file becomes active in the computer system at that hospital, they won't be released from the hospital until a member of the social work team either sees them or until DCF has been contacted.

Q. Okay. So you had –

A. I had all three. I had both children and mother flagged.

Q. Okay. And from there, what did you do?

A. I kept in contact by trying mother on the cell phone that had worked earlier in the day. Most of my calls went to voicemail.

I also was in contact with the MetroHealth [473] social worker, told her the serious concerns. I do have a working relationship with her, so it was easy to contact her and get back to her. And she shared the

concerns after I had spoken to her. And so on the flag, she had her specific pager number put on it.

Q. Okay. And did you ever meet with mom and the children for a staffing?

A. No. As it got closer to the staffing, I was unable to. And mom stated that it was very busy at the clinic that day and that she was still waiting, but I knew this to be false because I was also talking to the hospitals.

Q. Okay. So did you tell mom that?

A. At this time, no. I was more concerned about finding the children than calling mom out on something I knew that was an obvious lie. So I would have rather maintained a civil relationship and try to work with her for the serious concerns with the children than call her out, that she was lying to me.

Q. Okay. So what did you do?

A. So the clock was ticking, and there was nothing I could do but sit. So I had MetroHealth look through their personnel file on the children, and I asked if there was any other emergency contact, [474] like family member or neighbors or anybody that could help, you know, find a location of the children.

From there, I was given the number of maternal grandmother. And then I also went through our computer system. Mom has an extensive history with us, and I went through the old case record and found another family member, the great maternal grandmother. And so I did call those two relatives.

And my supervisor and I, we were speaking to the relatives, more so just trying to find a possible location of mom and the children.

Q. Do you know the names of those relatives?

A. Yes.

Q. What are they?

A. I spoke to great maternal grandmother, which is Hazel; and I believe her last name is also Traywick. And then I spoke to Schoen Traywick.

Q. Okay. And you were looking for where these kids might be possibly be?

A. If they had any idea. Oftentimes you'll find that maybe if mom's not at home she might be at a grandmother's home or a sister's home. So it's best to always ask the family first if they have any idea.

Q. And did they have any ideas?

A. They each gave us the same or very similar [475] assumptions.

Q. Which was?

A. Grandmother, Hazel – Grandma Hazel didn't know where they were, and she hadn't seen them in several weeks and stated that we need to check with mom's boyfriend. When asked if she knew where he stayed, she wasn't sure where he stayed but knew that his mom lived on the west side.

From there, we did look in our – again, through our computer system. We were able to, with his name and roughly his age –

Q. What was his name?

A. Darius Clark.

Q. Okay.

A. We were able to look him up, and he was named on a previous case of mother's as well as he has his own case history with his own biological children. So from there, we were able to go through his case history –

MR. MORGAN: Objection, Your Honor.

THE COURT: Sustained. Jury will disregard about his biological children. The jury will disregard that comment. You may proceed.

[476] A. From looking through the case history and the demographics, we were able to find who Mr. Clark's mother was and that she, in fact, did have an old address on West 100th. So I did ask Grandma Hazel if West 100th could possibly be the area, and she said that it sounded about right.

We also had – when I say "we," I mean my supervisor and I. We were very quick, and we were both kind of in tandem getting on the phone with the relatives.

From there, I spoke to Schoen Traywick, the grandma, and asked her. And she also felt that her daughter would most likely be with her boyfriend, Mr. Clark, and that the children would be with both of them or at least one of them. When asked if she knew where he lived, she stated she wasn't sure if he had his own place but often lived with his mother. If she knew where that was, she said the west side. Again, I asked could it possibly be on West 100th. She said ye.

Honestly, I wasn't feeling very certain that I would find one or either of the children. But, again, it was late in the day. I was very annoyed that I had been blatantly lied to all day. I had had this meeting scheduled and had to try to keep pushing [477] it back. Staffings are not easy to schedule.

So kind of in a moment of annoyance and so I just wasn't sitting at the office feeling useless, I was like, let's drive out to West 100th and just see if it works.

Q. Okay. So did you do that?

A. Yes.

Q. And?

A. My supervisor and I, we drove out there together riding in my car. We knocked on the door, and a young man, a teenage man, who I later found out was 16, he came to the door. And I asked if he knew [T.T.], the mother, [T.T.]. And he said yeah.

And I asked if he knew Mr. Darius Clark. And he said yeah. And I asked, Does he live here? And he said yeah.

I said, Is he home? And the child stated no, he wasn't.

And I asked, Do you know where either of the children are at this time? And he said, They're here.

So at this time, my supervisor and I asked if we could enter the home, and the young man let us in.

Q. Okay. And what happened?

A. We asked if there was any adults home, and he [478] said no. So it was a little awkward. And we're like, Well, can you bring us the children?

He said, He's sleeping. Do you want me to wake him up? And I'm like, Yeah. So he went upstairs.

There was a teenage girl there with him also. They would not allow us past – when you first walk in the home, you're in a living room, and it opens up into like another living room. And then you go back into the kitchen. So they were in – to the right. So he went upstairs and brought [L.P.] down. And we knew we had a substantiated case of child abuse when we saw him.

Immediately upon seeing him, you could see there was a loop-shaped mark from about the side of his face by his hear and it went through the corner of his eye and back; and then there was broken blood vessels. It was obvious when you looked at him, like, the whole corner of his eye was red.

Q. Okay. Was there anything else about [L.P.] that struck you?

A. Yeah. He's a very cute little boy, but his body language was guarded; and it's something that you become more familiar with seeing, obviously with my line of work. But he was very like, you know, I'm [479] a stranger. He didn't know me. And he was kind of very quiet, very hesitant, and he smelled. He was very – he was a medium skin tone, and just looking at his face and what I could see of his arms, he was very ashy. He smelled like he had hadn't had any oral hygiene in several days. His breath was horrible. He was wearing pants that were overly large for him and

kind of like just rolled at the cuffs. And it was dirty. You could see like – it was just very unkept. And he had on – when – later on when we got into the ambulance and you took off his shoes, his socks were just – they stunk very, very badly.

Q. Were there any other marks on his –

A. Oh, yeah.

Q. – face or body –

A. Yes.

Q. – that you could see at the time when you first –

A. Yes. Speaking to him, trying to make the child comfortable. You know, we were talking to him. Oh, I like your Spiderman socks. Oh, you know – my supervisor was saying how her son also likes Spiderman.

And I asked him if he minded if I could lift [480] his shirt and just look at this tummy area. And by that time, he felt a little comfortable and he allowed me.

When I lifted his shirt, I noticed – it was almost a perfect rectangle; and it was right under his one nipple area. I'd say it was about two and half inches, three inches by about an inch and a half deep, purple with like reddish edges, bruise.

And I, you know, asked him how it happened, and he just kind of, you now – and so rather than really trying to get into it, we wanted to see if there were any other marks. So I said, It's okay. It's okay.

I asked him if he minded if I looked at his back, and he was okay with it. And when I lifted his shirt, I could only get it up, you know, part way because it was

still on the child, and I could see the bottoms of several loop marks. And then there was like a small – there was like – almost like a small like puncture on his lower – I'm trying to recall – right side, I want to say. But – and then there was like various marks on his trunk.

Q. Okay. And what did you do after this?

A. This time, I just kind of looked at my supervisor and thought, oh, my God.

[481] From there, we asked – we moved forward and said, Is [A.T.] here? And the kids – I think the teenagers at this point were getting the severity of the situation and said, yes. She's upstairs.

My supervisor made to start going upstairs like, okay, let's go get her. And the teenagers – the boy got very secretive and was like, No. No. You can't come anywhere in the house. She's in another room. I'll go get her. So that was suspect to us, be we're like, Whatever. We just wanted the child at this point.

Q. Sure.

A. So a few minutes later, he came down carrying [A.T.]. And it became very evident to me, when I saw her coming down the stairs with the young man, this is a very serious situation.

Q. And why was that?

A. She had two black eyes, and there was a large burn on her cheek. It looked – I didn't know it was a burn from the distance of seeing her across the room, but it was a large like – she's a lighter skin-toned child; and it was like a deep red, pink, white, just like

her whole cheek. And just seeing the back eyes and the burns, I was like, This is a very serious situation.

[482] Q. Okay. So what did you do?

A. I excused myself out to the front porch for probably two minutes. At that time, I did text Detective Remington. I have her personal cell phone from prior cases. Texted her like, I'm going to need you on this one.

I also did then call 9-1-1 and identified myself as a children services worker, that I was at a home. At this time, the teenagers told me that Mr. Clark was coming home. I didn't know if me or my supervisor would be in danger, so I did request emergency police assistance.

Q. Okay. So what happened?

A. I went back in the home. From there, I – [L.P.] started to get more comfortable with us; and he was asking for something to eat, something to eat, something to eat, something to drink, something to drink. So the teenage girl – we went into the kitchen area, and the teenage girl made him a sandwich. And we were getting him a glass of juice. At this time, we were trying to look at [A.T.].

Also during this time, I did call mom out on her lie. You know, instead of using my cell phone and blocking the caller ID or using my office phone, which clearly identifies it's Cuyahoga County, I [483] asked the teenage boy if I could please use the house phone, and he said, Sure.

So I called mom from the house phone so that she would see the caller ID of her boyfriend. And she

answered real bubbly, you know, Hi. Oh, hey, what's up. And I identified myself as, Hi, it's, you know, Sarah Bolog from Children Services.

Immediately, she got very upset with me and wanted to know what I was doing there and where was, you know, Kay-Kay. I don't know who Kay-Kay is – but what was going on. And I stated that – was she still at the clinic and was it still busy, because I was a Darius's home with her children and it didn't seem very busy. And my sarcasm was not appreciated, and she became very irate.

From there, my supervisor got on the phone with her and explained Children Services policies and procedures of there's obvious serious safety concerns with these children. There's obvious serious – what looked to be marks indicative of physical abuse. And from there, we need to have a staffing.

And we did give her the option of, if she had a family member that could watch the children overnight, we could place the children there on what we call a safety plan and have a staffing the next [484] day to discuss how the marks happened. We often do this in case there is an accidental means for physical abuse prior to taking custody and placing them in foster care. It gives us the opportunity of getting more information as well as bringing the family together as a team.

Mom is absolutely adamant that she did not want anyone from her family contacted about this, that there was an open case, and that she would not give us a permission to have any family member care for the children.

Q. Okay. So what did you do?

A. Cleveland Police responded at this time. It was two uniformed officers. They came in. They saw the situation, and they saw that no adult was present. And from there, they radioed for their supervisor to come.

Their supervisor came. He saw the marks on the children and understood everything that was coming out as far as talking to mom on the phone, no adult. And he radioed for EMS to respond.

Also at this time, Mr. Clark, his mother, Ms. Scales came in. I guess one of the teenagers had contacted her. It was all happening so quickly.

Q. So what happened when she comes in?

[485] A. When she came in, it was very awkward at first. At first, she was, I guess, feeling out the situation. It was like, Who are you? What's going on?

And I understand because, you know, I am a stranger. I am in your home, and I am calling the police. So I understand her concerns or hesitation or just confusion as to what's going on. But then it – once more and more came out to light, it became very concerning, because at one point she was like physically trying to usher the police officers and myself out the door – like, They're no kin to me. You need to get out. These are just, you know, my boyfriend's girlfriend's kids. They're nothing to us. You know, they just – they just got here the other day

And at one point, the officer actually stopped and said, Does it look like – this is serious. We're not here just, you know, for shoots and ladders.

At one point, this is also where EMS had just gotten in; and we were starting to look at [A.T.] and the black eyes and the burns on her. And then her right hand was – she couldn't make a fist, and it was like completely swollen. And we're seeing [486] things outside of the clothing. And you could see where she had a bunch of little tiny like braids with beads on the end, and her hairline on one side did not match the hairline on the other side. And you could see where like two pigtails used to be, and they were ripped out at the root.

And so we're seeing the seriousness of the situation. And to have another adult come in and – at one point, EMS was like, Does this look like we're playing? And at this time, he found a large burn on her chest and lifted her shirt, and Ms. Scales, then, did somewhat look shocked and said –

MR. MORGAN: Objection.

A. – Oh, I didn't know it was that bad. I didn't know it was that bad.

THE COURT: Overruled.

THE WITNESS: Excuse me?

MS. DRISCOLL: Go ahead.

THE COURT: Go ahead.

A. And from there, though, she was very adamant that we had to get out of her home. We had to get out of her home. And she stated she had to take her son to North Olmsted, but I don't – I don't – and I didn't believe here, because it was right around school was getting out and a bunch of school-aged [487] children

started coming in, and just the way they were walking in the house, dropped their backpacks at the same spot, it seemed like this was a routine.

So I'm like, okay, well, rather than argue, focus on the children, though. We gathered the children, and we finished the initial on-scene triage of the children in the ambulance.

Q. All right. And what did that consist of?

A. From there, I went in the ambulance with the children and gave my supervisor the keys to my car; and she took my car down to our main office so she could start the process of taking custody of the children, as mom would not cooperate and give us any relatives' information.

Once in the ambulance with the children, it involved the initial triage where the EMS was taking notes: mark on this side; mark on this side; you know, the dry ashy skin or dirty this. And they were doing it for each child.

I assisted in either holding one child while they are working on the other and vice versa, but it involved – we had to take all the clothing off of each child minus [L.P.]'s underpants and [A.T.]'s Pamper at this time to see what else we could find other than the initial just lifting of [488] clothing in the home.

Q. And that was all –

A. In the ambulance on West 100th.

Q. And at this time, are you talking to the kids about who did it?

A. Myself, not right now. Because I have to admit, in almost ten years, it was some of the worst that I had ever seen.

MR. MORGAN: Objection.

THE COURT: That will be sustained. The jury will disregard that. Just talk about this case.

A. I'm sorry. So I was more concerned about trying to get an accurate representation of what all was wrong so I knew what steps I needed to take next.

Q. Okay. So you were in the ambulance?

A. Yes.

Q. And do you arrive at Metro?

A. Yes. I rode with the children from the scene to Metro.

Q. And what happens when you get to Metro?

A. We were met – again, like I stated, I had contacted Detective Remington from the scene to let her know what was going on.

[489] Once at Metro, we were met in the ambulance by Detective Remington, her partner, and the police photographer. Then we followed standard procedure for anybody in an ambulance going to a hospital. They checked us in, and they put us in one of the little emergency rooms.

Q. Did you contact anybody from there?

A. From Metro?

Q. Uh-huh.

A. I was in pretty consistent contact with my supervisor. And while at Metro, I know I spoke to the maternal – maternal great aunt. She arrived at Metro. And then the maternal grandmother, she also arrived at Metro.

And while I was at Metro, I had to complete the telephonic order of removal with one of the juvenile department assistant prosecutors.

Q. Okay. Did you have the opportunity to take photos?

A. Yes, I did.

Q. And where did you take those photos?

A. I started taking the photos in the home on West 100th. And then once we got the children into the ambulance and we were able to remove, you know, their clothing minus the underwear, I also took [490] photos in the ambulance.

MS. DRISCOLL: Your Honor, may I approach?

THE COURT: Yes, you may.

MS. DRISCOLL: Thank you.

Q. All right. Sarah, I'm showing you what's been marked as State's Exhibits 1 and 2 and then 46 through 63. If you could go through these, hold them up and tell us what you're looking at with identifying each one and what you were taking photos of.

A. These are the pictures that I took. This is a picture of [L.P.] getting a sandwich. But you can see from his ear looking around –

THE COURT: If you would identify it by number. Just say which one you're reviewing.

THE WITNESS: 1.

THE COURT: Okay. Proceed.

A. There's a loop-shaped mark that goes from about his ear over his eye and back. You can kind of see the broken blood vessels.

2, this is a head-on shot of [A.T.] where you can clearly see the two black eyes.

And 45, this is the side of her head where you [491] can see there once were two pigtails as well as –

MR. MORGAN: Objection, Your Honor.

THE WITNESS: Pardon?

THE COURT: Overruled.

Q. Go ahead.

A. – where the pigtails once were. And you could see the whole side of her cheek as kind of swollen up and purplish in color. And it's hard to see in a picture, but you can kind of see that the shading color, there was a big knot on her head.

Number 46, this is in the ambulance; and you can see what is the burn on her inner biceps. And then you can kind of see what was going across her chest.

Q. And that was [A.T.]?

A. Yes.

Q. Okay.

A. Number 47 – we're required, when we take pictures, to take a head-on for our case file since often marks are not necessarily on the face. So this is just – I told [L.P.] to smile and took a picture of him and his sandwich

Q. Number 48, this one is – it's – I apologize. My camera's not the greatest.

[492] [A.T.] was also crying. It wasn't the most cooperative picture. But when you pulled her lip down, there was a row of canker sores to match each of her bottom teeth. So in our investigation, it seemed like somebody had pushed her teeth into her lip causing the cankers.

MR. MORGAN: Objection.

THE COURT: I'll sustain what seemed to be, but the visual appearance may stand.

A. Number 49, this is where you can see her right cheek; and there's a large – what looks to be a burn as well as this is where you can see how her right hand was swollen.

Q. Was that right hand functional?

A. She could bend it. But as far as like fine dexterity and make a fist, I obviously – I always have ChapStick with me. And, you now, Do you want some lipstick? She wasn't able to finely grasp it.

Q. And how did it feel to the touch?

A. It was very cold. It was freaky. Like, usually – I know I always have cold hands, but when you touch the back of my hands they feel normal. It was bizarre to me.

Number 50, this is in the ambulance with EMS. [493] They were pulling her hair back so that you could clearly see the two spots where the pigtails were, as well as there was like a scaly rash through her scalp on that side.

Q. Okay.

A. Number 51, this is [A.T.]'s backside. You can see how dry and ashy their skin was as well as a circular burn on the back of her thigh.

Number 52, this is [A.T.] again. Looking up at her jaw, you can see again where her cheek is kind of swollen and bruised; but you can also see a burn along her jawbone.

Number 53, this is [L.P.]. And it's a loop-shaped mark right around his jugular. And this one, although it's bruised, you can see in the picture where it did break the skin and was scabbing over in spots.

Number 54 is where we lifted [L.P.]'s shirt, and you can see the whole width of his back is a solid mass of loop-shaped marks.

55, this is in the ambulance. This is [L.P.]. When we took his shirt off and lifted his right arm, you could see there was more loop-shaped marks as well as like straight marks, bruising. And there was a small – what looks to be a puncture [494] wound on his lower right side.

Number 56 is, again, the right side; but this time the EMS worker was pointing to the puncture wound.

57, this is [L.P.] again in the ambulance. And you can see on his shoulder biceps area another loop-shaped mark.

Number 58, this is, again, [L.P.]. This is his other shoulder biceps area. And you can see the whole top is kind of bruised, and then just other small marks and bruises, a couple quick straight lines.

Number 59, this is [L.P.]'s thigh. And you can see a loop-shaped mark here and a loop-shaped mark beside it. This is also in the ambulance.

Number 60, this is in the home. This is when we lifted his shirt and – the square bruising under his nipple area I had previously discussed.

Number 61, this is a better picture of [A.T.]'s right cheek and the burn that was on it.

Number 62, this is in the home on West 100 when we lifted [A.T.]'s shirt and we found a large burn on her chest area.

And, lastly, Number 63, this is just a close-up of her swelled-up hand, [A.T.].

[495] Q. So you took all of those photos?

A. There's one that I'm in it, so my supervisor took it; but, yes.

Q. And they were all taken March 18th, 2010?

A. Yes, they were.

Q. And do they accurately depict what you saw on March 18th, 2010?

A. Yes.

Q. What else did you do through your investigation?

A. A lot.

Q. From there. You're at the hospital.

A. Okay.

Q. Jackie Strozier comes in? Schoen comes in? Grandma –

A. Yes.

Q. – comes in?

A. No. No Grandma Hazel didn't come. It was just Jackie Strozier and [L.P.].

Q. Schoen?

A. Schoen. I'm sorry. I was so busy that night I kept intermixing the victim's name and his grandma's name, because she was named after him [sic].

So from there, I just do a telephonic order [496] removal with one of Children Services assistant prosecutors. I spoke with doctors. I spoke with the relatives. I met both Jackie and Schoen outside the exam room prior to them seeing the child.

Q. What was the purpose of that?

A The purpose was, is because at this point I knew I had serous child abuse and neglect. And I didn't know if – I believe –

MR. MORGAN: Objection, Your Honor.

THE COURT: Overruled.

Q. Go ahead.

A. I didn't know if either of these women had any idea of this, when the last time they saw him was. I didn't know their role in it as well as if they didn't know anything about it. I didn't want to just throw them – Oh, here's your relative. Look at how they look now.

Q. Well, at that time, did you ask them when was the last time they saw them?

A. I did.

Q. Okay. Did they tell you?

A. Before I let them see the children, I asked them, you know, What's your relationship with the children? What's your relationship with mother? [497] When's the last time you saw the children? What did they look like then? How were they acting?

At this time, they got there within enough time of each other that I was first able to speak with Jackie and have this conversation with her, then go in the room with her. And then it was probably – I don't know – within the next 20, 40 minutes that Schoen had arrived. So I was able to have a repeat. So each conversation I had with the women was one on one.

Q. So tell us your conversation with Jackie.

A. when I got there, Jackie was very concerned; and she was flustered like you normally would if somebody called you and was like, Hey, Children Services, I need you to come to the emergency room because I have your relatives. So she wanted to know what was going on.

And I asked her about the children, and she gave me an accurate description of what you would think of a toddler and a small child. She said that, you know, she's close to them. She hasn't seen them in several weeks; that, you know, yes, they know her; yes, they're comfortable with her.

Q. Did she indicate the last time she did see them?

[498] A. The last time she had saw them, she said, at her nephew's birthday party. There was a cookout where the whole family had gone.

Q. Okay. Did she tell you the date of that?

A. She didn't know the exact date. I got the date later from Schoen. It was her son.

Q. All right. So what else did you and Jackie discuss?

A. I asked Jackie if she had noticed any injuries or, you know, was – did [A.T.] – is she clumsy? Does she walk? And, you know, the description of the child she was telling me was not the description of the child I had just spent the afternoon with.

She was telling me about a child who was bubbly; and she was in the beginning stages of, like, words and short phrases; and was walking and running. She had yet to say a word when I was with her. And when we would try to get her to walk, even in the ambulance, she wouldn't walk. We had to carry her everywhere.

So I'm thinking that this woman really doesn't know the kids because this child doesn't walk or talk. So I'm starting to feel a little sketchy on Jackie. And I was like, Okay.

Well, I gave her a brief rundown of the [499] injuries. At this point, she kind of grabbed the wall and started crying. And I explained to her that I wasn't going to allow her to see the children until she could pull herself together, because they had been through enough. So she kind of pulled herself together. And when she saw the kids, she got really like (indicating) again. And I'm like (indicating).

From there, she sat on the bed in the emergency room exam room, and the children did know her. I was able to see that they did. And, you now, [L.P.] kind of went and sat by her. And from the moment she walked in, [A.T.] like – kind of like how you see bats, where the baby bat grabs on with both its arms and legs. [A.T.] grabbed onto her with her arms and was wrapping her legs around her and was not going anywhere.

And so Jackie was, you now – and we were trying to talk to the children about not the marks but, oh, are you hungry? Do you want something? And, you know, one of the nurses brought us like stickers. So we were talking about what's in the stickers, just trying to calm the children down, gain some trust, smooth it over. And then that's when the hospital staff came and got me again and let me know that another relative, which was Schoen, had arrived.

[500] I went back out in the hallway. I had hospital staff bring her down the hallway, and that's where I had the conversation with her also.

Q. All right. Before we get into Schoen, did Jackie notice anything different –

A. Oh, yeah.

Q. – about the kids?

A. Yeah. Jackie's first reaction of seeing them, she became so upset. The family had the nickname for [A.T.] of Fatty Mama, because she was that little chubby one where she, I guess, had had chubby cheeks and, you know, the little – where you're starting to walk and you still have the baby fat rolls. It's not what I saw. And Jackie immediately expressed a concern of the amount of weight that she had lost, and then the marks on her.

And then at this point, which I didn't have a diaper bag with me, you know – she obviously had a full Pamper. It was full of urine. So Jackie went to change her Pamper, and [A.T.] had a very, very strong reaction to having her Pamper changed. Like, I know that a lot of toddlers don't – you know, nobody wants their Pamper changed, but it was very, very strong, and just the fear of having somebody she know even changer her Pamper. And that was very [501] upsetting to Jackie. And she said that had never happened to her before. So in my line of work, that was very concerning to me.

Q. Okay. So now Schoen gets there?

A. Schoen.

Q. Okay. And what happens when Schoen gets there?

A. Again, I stepped out into the hallway; and I tried to assess just speaking to her. When was the last time you saw the children? What were the children like when you saw them? What's your relationship

with your daughter? When's the last time you saw her? You know, briefly go over the injuries.

She also told me that there had been a family cookout for her son, Jaylin, and that everybody had come over to the home, and they had had a cookout, and the kids were there.

I asked her, When was his birthday? And his birthday was in the end of February. It happened that his birthday this past – this year fell during the week. So they had had a big part on that Sunday.

And she identified – she went through her phone and looked at the calendar on the phone, and [502] she identified the date to me as the last Sunday in February, the 28th.

And I said, Were the kids there?

Yes, they were there.

How were they?

And she said they were normal. They were how they always are.

And because of what Jackie had told me that [A.T.] was walking and talking, I said, Oh, you know, now does – [A.T.], do you have to carry her? And Schoen's sitting there like No, she walks. She was walking. She was talking.

And I was asking like, Well, what does she say, just easy words? She's like, Oh, no. She's able to ask for things to eat, this and that.

And I asked, is she a skinny child or, you know, like a little fat child? And she said, Oh, Fatty Mama?

So it was – and she's looking at me very suspect in questioning like why all these questions. She was getting upset and wanted to see her grandchildren. Where are the kids?

So I briefly ran through the – a quick rundown of the injuries on the children, and she became very upset. And I asked her if she knew where [503] her daughter was, and she said she didn't at the time. You know, she had no idea what was going on, and let her go in and see the children.

And from there, she had the same reaction as Jackie, which was – she got very upset and started to – like tears. And she sat down right away and was holding [L.P.] and was interacting well with the children.

Q. So when you asked her about where her daughter was, she didn't have any idea?

A. She didn't know if she was out of state in Washington, D.C., or if she was in state, but she had heard both –

MR. MORGAN: Objection.

THE COURT: I'll sustain what she said to you. You can tell what happened.

Q. Okay. So she goes in and sees the kids?

A. Yes.

Q. And does that end your investigation?

A. I wish.

Q. So what do you do?

A. Well, just with the external injuries and no one had been able to see the kids from – what we now know – from February 28th until March 18th, as far [504] as family members, we did ask MetroHealth to do a full skeletal scan of each child to rule out any current or past breaks of any of their bones.

While each scan came back with nothing, and they were clean, it was still very – it was very traumatic for the relatives and myself as well as the children to have those scans done. At one point, [A.T.] was so terrified and stressed out from strangers that – when you're having a skeletal scans done, there's certain positions that each hand, each bone needs to be at so you can have a clear picture of the skeleton.

And [A.T.] was so fearful that – as cruel as it seems – we had to have her strapped down to a backboard in order to get all the skeletal scans done. And the process takes about 40 minutes, and it was very painful. Schoen had to be in the room with her while it was done; and she screamed the whole time. And by the end of it, Schoen was just sobbing.

After that, we did have the order of removal. From there, it was decided that [A.T.] would go stay at a relative placement at Jackie Strozier's house, and then [L.P.] would go stay at Schoen's house as a relative placement.

We left Metro Hospital approximately 11:30 at [505] night, midnight the next morning. So we're on the 19th now.

Q. Okay.

A. Yeah. The 19th. I had the emergency custody court hearing at juvenile court at 8:30, 9:00 in the morning. So I was back in court. And the agency was awarded emergency contact and –

Q. Who else was present at that hearing?

A. Myself, the assistant county prosecutor. I don't believe any family members came to that one. If they, it was only Jackie and Schoen. Mom didn't come.

Mom was – I did call mom the night before from a telephone at MetroHealth in one of the conference rooms, and I explained to her a rundown of everything that had happened since I confronted her on the telephone.

Q. Is that the same as the staffing?

A. I'm sorry?

Q. Is the staffing the same thing as the emergency hearing?

A. We didn't' even get to have a staffing here.

Q. Okay. So the emergency custody hearing happens in the morning. Did you schedule a staffing?

A. Yes.

[506] Q. When was the staffing to be held?

A. The staffing was in the morning. The emergency custody hearing was in the afternoon. I apologize.

Q. Okay. And who was the staffing?

A. At the staffing was me my, supervisor, an agency facilitator, maternal grandmother, Jackie

Strozier, great maternal grandmother Hazel, maternal aunt Jackie – [L.P.]'s grandma, and then [L.P.]'s husband – starts with a T –

Q. Terrence Carter?

A. Yes.

Q. And what happened at the emergency custody staffing?

A. At any staffing, we have the same procedures. We stay – we do the introductions. We say why we're there. We identify the concerns. Obviously, at this one, the agency already had custody. So we stated the reasons of removal of why we took custody.

Another reason we have the staffing is – although the kids did spend the night at family members' homes, there's still procedures we need to do, which is our FBI and BCI background checks and fingerprints as well as a worker needs to come out to the home, view the home, you know, a whole gamut of [507] things to make sure that where they go are safe.

Q. So you're not doing these things just to be nosey?

A. Oh, no.

Q. Why are you doing these things?

A. For the permanency and safety of the children.

Q. Okay. So did you have to do a check on all of the people that were there?

A. Everyone that was at that staffing was. We have a digital fingerprint machine or computer system

at our main building, and I'm – is there any way I can get just a little glass of water?

THE COURT: I can get you a glass of water.

A. And then from there, we have staff that are trained to do the fingerprints. So each person that was there, they have to prove Ohio residency as well as we had the digital fingerprints. And they sign for a background check. We also are able to, through the sheriff's department, on our hotline staff, they do a leads check where we can get like a quick surface background check.

So everybody that was present was fingerprinted. We went over the agency's goal, which is to have temporary custody taken of the children [508] and find safe placement as well as to continue to investigate the child abuse and neglect.

We did ask the family if they knew where mother was. At this time, the family stated they believed she was in the Washington D.C. area.

MR. MORGAN: Objection.

THE COURT: That will be sustained as to what the family said.

A. I knew this also to be the alleged truth because when I had spoken to the mother –

MR. MORGAN: Objection.

THE COURT: yeah that's sustained.

Q. Did you speak to the mom, [T.T.]?

A. I spoke to her the previous night right before I had left Metro.

Q. Okay.

A. And, I mean, at this point, I had like zero patience, and I was kind of like, Be honest. Where are you? And at this point, she told me that she wasn't coming to the –

MR. MORGAN: Objection.

THE COURT: Sustained, what she told you. You can't –

THE WITNESS: Don't say –

[509] THE COURT: The objection is sustained. Put another question to the witness.

Q. What else did you do through the staffing?

A. We had to go over all the injuries of the children. Again, maternal grandmother had not heard the injuries before. Also, with the way that [A.T.] reacted to a known close family member changing her Pamper and with her aversion to strangers, we did have to disclose at this time our concerns –

Q. Did you make several referrals regarding the –

A Yes.

Q. – the relatives as well as the children?

A. Yes.

Q. – of your safety plan?

A. Yes.

Q. It's something that you do in order to make sure the kids are safe?

A. Oh, we have to do it for every case. I mean, if there's no reason for the agency to offer services, then there's no reason for a staffing or a [510] a safety plan. So we obviously had to offer services. And especially in this, when into the staffing, they had to bring up with her aversion to the Pamper changing and to strangers, I did make a referral to our sex abuse unit because it –

MR. MORGAN: Objection, Your Honor.

THE COURT: "Referral" can stay on, that she made a referral. Next question, please.

Q. Can you tell me all of the referrals that you made in connection with this case, just the referrals?

A. Yeah.

Q. What are they?

A. I referred the family to Children Who Witness Violence, both the children and then the extended family members. The children were – I did a referral for University – yeah – University Dermatology on East 22nd, for [A.T.], due to the rash and whatnot through her scalp. And then I contacted the Cleveland police for the investigation, and I think that was it for my part of it.

Q. Help Me Grow?

[511] A. Oh, yeah. It's an agency policy, anybody under the age of three, whether we substantiate a case of neglect or close the case, we have to do Help Me Grow.

Q. Okay. And what about the Caregivers Local Community –

A. We link them up at our staffings. We have all of that information, and they're given that information at the staffings.

Q. Okay. And from there, what's your involvement?

A. From there, I had to follow through with checking each home, completing the internal paperwork as well as have the caregivers sign off on the paperwork for the placements. I did a clothing order, because we didn't have any clothing for either children. So I did clothing orders that enabled the relatives to go buy some clothing for the children.

I went to the dermatology appointment with Jackie and [A.T.] for the issues with her scalp and head and burns.

And then I write up my whole investigation, and I do what's called our safety assessment and our family assessment. And I transfer the case to an ongoing social worker who sees the case for the life [512] of the case. And then I also did all of the custody complaints and filings for juvenile court. Yeah.

Q. At any point during your investigation, did the child [L.P.] say who did this to him?

A. Yes.

MR. MORGAN: Objection.

THE COURT: Overruled.

Q. Can you tell us about the circumstances and what he said?

A. Yes. He did so twice in front of me.

Q. Okay. What were the circumstances the first time?

A. The first time was in the home on West 100, and it was right before the commotion of the kids coming from the school and, you know, the police were there and everything was going on. Like I had said earlier, not questioning like you would question an adult, but we each – our supervisor and I, we had our cell phones. And her son is about [L.P.]'s age. So we were talking about super heros, and she was saying how, Oh, Nicholas loves Batman. Do you like Batman?

So we were talking to him in a manner of – about her son. I was showing him pictures of my dogs, and we were trying to gain that trust. And in [513] talking about things non-related, we would throw in a question about the investigation. So it was like fun question, fun question, fun question, how did you get this mark on your face? And his body language changed.

My supervisor was showing him pictures of Nicholas and she goes, Well, how did you get this? And he said – he put his head down and he said, Daddy did it. Dee did it. And he just said Dee did it.

And then the second instance where he said it in front of me was at the hospital. Detective Remington and her partner had come in. And Detective Remington had gotten him a pink stuffed animal or something from somewhere; and she was trying to play with him and, you know, how you would with a little kid and playing with [A.T.].

And [L.P.] was very interested in her badge and handcuffs, you know. Who cares about this stuffed

animal. And at this point, she had a picture of Mr. Clark. And she asked [L.P.] if he knew who this was, and he said, you know – looked at it and was like (indicating) and turned his head and said, It was daddy. It was Dee.

So when asked – and then had asked him, Well, [514] how did you get these marks? What happened? And he said again, Dee did it.

Q. Are you trained it talking to children?

A. Yeah. We go – when you first start the agency, there's – before you can get any cases, there's many weeks of training. And then when you – you have to shadow older workers. And then when you do get your first cases, it's oftentimes that you'll have older workers in your unit or in your department that you'll go out with.

So I may go – I was fortunate enough that I knew a girl from my same program at college. So I would go out with her on her cases and see how she did interviews, and she would go out with me. And as I was doing my first few interviews, she would maybe interject a question just to help get that comfort and to know what we're looking for.

Q. So is there a protocol when questioning children? Are you to lead them?

A. No, no.

Q. Okay. And so you don't lead. And did you know who Dee was?

A. I had no idea.

Q. So you put that word or that –

A. No. I didn't know, and it wasn't until [515] like – when he's saying "Dee" and "daddy," I'm thinking his biological father that I found out his information from child support. And it wasn't until Detective Remington had a picture and he identified that pictures that that's Dee, that's daddy, that I put Darius Clark with who the child identified as Dee.

MS. DRISCOLL: Thank you. No further questions.

THE COURT: All right. Ladies and gentlemen, we're going to take the afternoon recess. During the course of the recess, do not discuss the case with anyone or let anybody discuss the case with you. We'll be in recess for approximately 10 to 15 minutes.

Everybody please rise while the jury leaves the courtroom, please.

You can step down.

(Thereupon, a recess was had.)

* * *

[516]

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(Thereupon, the following proceedings were had in open court in the presence of the jury).

* * *

THE COURT: Mr. Morgan, your cross-examination?

MR. MORGAN: Thank you, Judge.

* * *

CROSS-EXAMINATION OF SARAH BOLOG

BY MR. MORGAN:

Q. Good afternoon, Ms. Baylog [sic]. How you doing?

A. Good afternoon, sir.

Q. Let me ask you a couple questions. Do you know what an activity log report is as it relates to CFS?

A. Yes.

Q. What is that?

A. It's my case notes.

Q. Okay. Case notes are put into a computer?

A. Now they are. Yes.

Q. Okay. Were they put in a computer back in March of this year?

[517] A. Yes, they were.

Q. Okay. Are they put in under like – this is Sarah Baylog's – everything's under Sarah Baylog's, or are they grouped –

A. Bolog.

Q. Pardon me?

A. It's Bolog. It's not "bay"; it's "bo."

Q. I'm sorry. Are they put in under like your name, or are they put in under the alleged child victim or –

A. Both.

Q. Both. Okay.

A. Not the alleged child – well, there's – we have a new computer system that all 88 counties share now. And the reports you're looking at, the activity logs, there's a – it looks like a rectangle at the top with the titles. It will have, where it has the child's name – we can click in the computer system on if it's regards to – if its completed, like we made face-to-face contact with that person. It will also have the family name, and it will have who generated that report. So, in my case, it would either have my name or my supervisor's name as we have access to the same case.

Q. Who is Howard Little?

[518] A. Howard Little is the coworker I was telling the prosecutor earlier about. He had had the case on March 17th during the day, and then I picked it up that evening from him. He sits beside me.

Q. Okay. Howard Little would also put notes in for the activity?

A. All Children Services workers are required to do activity logs.

Q. Do you do it like at the end of the week, or do you do it at the end of each day or –

A. It all depends. I was doing some earlier today for cases I'm currently investigating while waiting to go on the stand. WE have – the State system is now an Internet-based system. So, have computer; have internet; will travel. We can do it from any Internet site.

Q. Okay. You stated that at some point on the – I think it was the afternoon of March 18th, you were back at your office and decided, Hey, let's take a ride out to West 100th?

A. Yes.

Q. Okay. And at that point, you were involved in this case with [L.P.] and [A.T.], correct?

A. At that point, it had been reassigned to my name.

[519] Q. While you were at the office, did you do anything to bring you up to speed as to what maybe Mr. Little had found out?

A. Oh, of course. Yes. My supervisor, she's – our whole unit is a very close unit. The physical space that our unit takes up is quite small. We're also known in the agency as being a tight-knit unit. We often are in constant communication with various unit members and our supervisor either with E-mail or text messages or on our phones with each other. It's a rarity that we don't cooperate with each other or we don't have interaction on each other's cases.

Q. Well, let me ask you this: That afternoon on the 18th –

A. Yes.

Q. – were you able to view what Mr. Little might have put into that activity log?

A. I did not read the activity log, because I spoke to Howard myself.

Q. Okay. And Howard brought you up to speed –

A. Yes.

Q. – on it, correct?

A. Yes.

Q. Okay. Howard had the opportunity to do a little bit of work on it on March 17th, correct?

[520] A. Correct.

Q. Okay. I believe you had told Ms. Driscoll that on the 18th, when you're at the house on 100th Street, you didn't know who Darius or Dee or dad was, right?

A. I wasn't sure myself. No.

Q. Okay. You had – had you heard that name before?

A. I had heard – which are you asking, Dee or Darius?

Q. Either one.

A. I knew the name Darius as – when a call is called into the 696-KIDS hotline, we're asked to – the hotline screeners will ask you, you know, What's mother name? What's the children's name? And in the course of giving your description of the abuse or neglect, they'll also ask you, Well, who did this alleged abuse or neglect?

So when the report was made, our report – our priority code had Darius Clark listed as an alleged perpetrator. So I had seen the name on that. I has spoke to father – not father. I apologize. I spoke to Howard, and he had said Dee did it. That's who the child had reported to him. But I wasn't sure since I hadn't spoken to the child or Mr. Clark if [521] Dee

and daddy were the same with Darius. I was not sure until the child identified a picture. Yes. I had heard that, but in my mind I was not clear until I saw the child make a connection with the picture.

Q. You had no connection before that – is that what you're saying – between Dee or Darius?

A. I know it had been said, but hearing it from – we oftentimes get false allegations. So, yes, I do go out and investigate false allegations from the 696-KIDS hotline. So for me being an investigator, what I get from the hotline on paper, I don't just take it as the god's truth. I take it at face value. And although it might be written on paper or I might have somebody tell me, until I'm able to prove it in my own mind or I'm able to see a connection, I tend to try to play a devil's advocate in my head or take things at face value.

So, yes, I had heard that. But until I myself witnessed the child being in the connection with the picture, for me, it's something I had had heard, but it wasn't – I wasn't a hundred percent convinced until I saw him make the connection.

Q. you just said something that struck me. You said that you oftentimes get false allegations.

A. We get hundreds and hundreds and hundreds of [522] calls to the 696-KIDS hotline every year. I mean, right now I'm carrying a caseload of the low 20s. And you figure, if you're getting 15 to 20 new cases a month, not every single case that we get is substantiated child abuse or neglect.

The majority of cases the Children Services gets, while we have to treat them all the same and investigate them fully, the majority of the cases are false allegations or are found to be not child abuse or neglect.

So that's what I meant by that. I'm not saying in this specific case. I'm saying in the general scope of the calls we get to 696-KDIS.

Q. Okay. When you get these unsubstantiated or false, whatever you want to term it, tell me if I'm wrong, but most of the time it's probably false or unsubstantiated as to whether or not abuse occurred, correct?

A. Yes.

Q. Okay. But there are occasions where there may be abuse that occurred, but the falsity may be as to who the alleged perpetrator is, correct?

A. You can have that.

Q. Okay. So there are times when individuals may say, Joe did it or whatever, but that may be the [523] farthest thing from the truth, right?

A. And that's my job as an investigator, to go out and determine, A, if the abuse happened or did not happen and, B, if Joe did it or did not do it.

Q. Well, these people are the ones to determine that, right?

A. In this courtroom. But in the DCFS investigation, it's my job for our investigation.

Q. But with false allegations, there's times when the alleged victim will name the wrong perpetrator, correct?

A. I can see where that would be a possibility.

Q. That happens, correct?

A. I'm sure it does.

Q. Okay. Ms. Driscoll had asked you about leading an alleged victim. You would never do that, right?

A. No. I mean, if I'm speaking to a child and I – I often try not to ask flat out questions that would make a child scared or not trust me. I try to get the information from my investigations in more a conversational manner.

A lot of times, if young children – if they're frightened or they might not have the cognitive abilities or they might not have the verbal [524] skills, we – like [A.T.], she was unable to verbally tell me anything. So although I witnessed her, although I spent time with her and I can tell you her mannerisms and how she interacts with people, I had to, what we call, waiver her interview, because I wasn't able to verbally speak to her.

Q. Okay. But as far as yourself with interviews, you would never lead –

A. I don't need to. No.

Q. Okay. So you would never have said something like, you know, Dee did it, didn't he, or anything like that?

A. No. That's beneath me.

Q. All right. During your investigation, you had the opportunity to talk to the maternal grandmother and maternal aunt, correct?

A. Yes.

Q. Okay. When you had talked to them, you had heard about a birthday party at the end of February, correct?

A. Yes.

Q. Isn't it a fact that Jackie Strozier, the maternal aunt, told you that she saw bruises on [A.T.] at that birthday party in late February?

A. She may or may not have. I was more concerned [525] with the actual burns. And when asking about the bruises for this case, I was more concerned about the loop-shaped mark bruises and bruises I know typically indicate child abuse.

Q. Let me ask you this: Did Jackie Strozier say anything to you – and, again, we're talking about the birthday party on the 28th.

A. Yes.

Q. Did she say anything about talking to [T.T.] about maybe taking the kids from her for a little while?

A. Yes.

Q. Okay. And in that conversation, wasn't there some mention from Jackie that there was bruising on [A.T.]?

A. Again, I don't recall what specific bruising Jackie was talking about. But, yes, she did tell me

that she had had a gut feeling and she had felt that things weren't right and that she had asked [T.T.], Let me watch the kids while you get yourself together.

[T.T.] is not – [T.T.] and some of her deficits as a parent are not new to her family.

Q. They're not new to her family?

A. No. This has not been a new issue with these [526] children. This has been an ongoing issue for years and years and years.

Q. Okay. How many children does [T.T.] have?

A. Five.

Q. How many does she have custody of?

A. None.

Q. The first three were taken away previous –

A. The first three were removed by Children & Family Services. Children & Family Services went through the temporary custody portion of it, and then we did receive permanent custody of those three children where parental rights are severed. And they were adopted out by another family member.

Q. Okay. In your conversations with the maternal grandmother and the maternal aunt, did they express to you anything to the effect that [T.T.] is a big liar and you can't trust a word that she says?

A. Yeah.

Q. Okay. You had the opportunity to talk to [T.T.] regarding this, correct?

A. On the telephone.

Q. Okay. Most of what she said turned out to be not true?

A. A lot of things she said to me, yes, turned out to be false.

[527] Q. So she was consistent with the opinion expressed by maternal grandmother and maternal aunt?

A. Sure.

Q. Okay. Did you come to a point in your investigation that you would have a hard time believing anything that [T.T.] said?

A. I have a hard time believing what most people in my investigations tell me until I can prove it. I've been lied to a lot in the last ten years.

THE COURT: The question was about [T.T.]. Just answer the question, please.

A. Yes.

Q. So you'd have a hard time believing anything she says regarding this, right?

A. Yes.

Q. Is she the type of person that would tell you something to protect her own backside?

MS. DRISCOLL: Objection.

A. Don't know.

THE COURT: Overruled. It's cross-examination.

A. I don't know.

MR. MORGAN: Thank you.

THE COURT: Any redirect?

[528]

* * *

REDIRECT EXAMINATION OF SARAH BOLOG

BY MS. DRISCOLL:

Q. Have you ever met [T.T.]?

A. No. I've only spoken to her on the phone.

Q. And how many days of phone conversations have you had with [T.T.]?

A. Just several days. I typically process cases fast.

Q. So it was – started out originally –

A. On the 18th.

Q. Okay.

A. I think I only had the case about nine days.

Q. So any basis you have of [T.T.]'s truthfulness or credibility –

A. Only what she had said probably on two or three days' worth of phone call.

Q. Pretty limited?

A. Yes.

MS. DRISCOLL: Okay. Thank you. No further questions.

THE COURT: Any cross on that?

* * *

RECROSS-EXAMINATION OF SARAH BOLOG

[529] BY MR. MORGAN:

Q. Pretty much [T.T.]'s a big liar and you can't trust a word she says, right?

A. I don't know. I mean, she lied to me a couple days when I talked to her on the phone.

Q. Thank you.

THE COURT: Okay. You may step down. Thank you. State may call your next witness.

TESTIMONY OF HOWARD LITTLE

[623]

* * *

The STATE OF OHIO, to maintain the issues on its part to be maintained, called as a witness, HOWARD LITTLE, who, being first duly sworn, was examined and testified as follows:

THE COURT: You may take the witness stand, sir. You may proceed, Counsel.

MS. KARKUTT: Thank you, Your Honor.

* * *

DIRECT EXAMINATION OF HOWARD LITTLE.

BY MS. KARKUTT:

Q. Would you state your name and spell your last name for the record?

A. Howard Little, L-i-t-t-l-e.

Q. And where are you employed?

A. Department of Child & Family Services, [624] Cuyahoga County.

Q. And how long have you been employees with that agency?

A. Six years.

Q. And in what capacity?

A. Intake, social work, doing investigations.

Q. And what are your duties as an intake social worker?

A. To investigate allegations of abuse and neglect, dependency, emotional maltreatment.

Q. I'm going to ask you if you could just move the microphone just so that everyone can hear you clearly there.

Okay. And how do you receive the cases that you're called upon to investigate?

A. They're assigned through our intake.

Q. And how are those calls received by Children & Family Services?

A. Through a hotline, anonymous.

Q. And how quickly after that call is received into your hotline are you called upon to go out and investigate?

A For a Priority 1, which was the call that was received, you have to go out within an hour.

Q. Within an hour?

[625] A. Uh-huh.

Q. Mr. Little, I'd like to call your attention to the date of March 17th of this year. Did you have to go out and investigate a Priority 1 on that day?

A. Yes.

Q. And where did you respond to?

A. I responded to a daycare center on East 33rd – on East 23rd and Community College.

Q. And what did you find when you arrived at the daycare center?

A. Found a child, [L.P.], who had some marks, some noticeable marks on both his facial area, mid sternum, a couple welts on his top shoulder blades, and some old bruising on his forearm.

Q. And you had an opportunity to observe that?

A. Yes.

Q. And who was [L.P.] with when you made those observations?

A. When I made those observations, he was with his teacher, daycare teacher.

Q. Was anybody else there when you first arrived at the daycare center to investigate this Priority 1?

A. The daycare center manager was also there in the building. She wasn't particularly in the same room.

[626] Q. And did you have any conversations with [L.P.]?

A. Yes.

Q. Okay. And who did you have those conversations in the presence of?

A. Those conversations were in the presence of the daycare manager and [L.P.].

Q. And what did you talk to [L.P.] about?

A. I talked to [L.P.] basically about how did he receive the bruising that was on his left facial area and

also about basically trying to get more information about who was the last offender who was named Dee.

Q. I'm sorry?

A. Basically trying to find out who was Dee, who was named as one of the last –

MR. MORGAN: Objection.

A. – the last offenders in the case.

THE COURT: Overruled.

Q. And how did you go about trying to get that information from [L.P.]?

A. Well, first of all, we brought in some toys, tried to kind of get him comfortable. He first – at first, didn't open up. But after the interview went along, he kind of mentioned some things.

[627] Q. And what did he mention to you?

A. He mentioned that Dee was his father, that he lived in the home. He had mentioned that – first, that he had sustained some marks and bruises from falling down the stairs. But when I re-questioned him and tried to make him feel a little more comfortable, he later stated that the bruises came from Dee, which at first, of course, he said it was his father – and said that the bruises came because he didn't put his toys back up and they were thrown all over the floor. So that's why he got a spanking for that.

Q. Did you try to ascertain from [L.P.] if he had any brothers or sisters?

A. Yes.

Q. And were you able to determine that?

A. He said he had some siblings, but he wouldn't give us the name of either.

Q. Why was it important to determine if there were any other children in the home?

A. To, of course, eventually try to speak to them and determine their risk factor for safety.

Q. And while you were speaking with [L.P.] on March 17th, did anyone ever come to the daycare to pick him up?

[628] A. Yes.

Q. And who came to pick up [L.P.] that day?

A. Darius Clark.

Q. And did you have a conversation with Darius Clark?

A. Yes.

Q. And what did you talk to Darius Clark about?

A. Talked to Darius Clark about the allegations, the allegation that the child had some bruising to the left side of his face that we're not there, per se, a few days ago; but that, you know, the bruises were noticeable that day, so the call came in.

Q. What was Darius Clark's reaction?

A. Darius stated that he basically knew nothing about it.

Q. Okay. So the first thing he said was he didn't know anything about it?

A. Uh-huh.

Q. And then did that change?

A. Yes. Then he stated that he had last spanked the child a week beforehand.

Q. So he said he had last spanked [L.P.] a week before?

A. Uh-huh.

Q. And then what else did he tell you?

[629] A. He also said that the child had gotten it from playing outside because he lives in the projects.

Q. Okay. Anything else?

A. Also, I asked to speak with mom. He told me that mom had a job working the census bureau, and she didn't get off until 8:00.

Q. Now, did you request any type of phone number for the mother?

A. Yes.

Q. And was Darius Clark able to provide you with any type of telephone number?

A. Yes. He provided me with his number and said I had to call him in order to bet into contact with her.

Q. Everything had to go through Darius Clark, then?

A. Yes.

Q. And did you ask him who lived in the home with him?

A. Yes.

Q. And what did Mr. Clark tell you?

A. He said that he lived in the home with the child and the other children.

Q. Other children?

A. Uh-huh.

[630] Q. Did he give you any other information about who those children might be?

A. No. I asked him about who the other children were, and he said I would have to ask mom.

Q. Did you try to ascertain if there was anyone in the household that went by the name of Dee?

A. Yes.

Q. And what did Mr. Clark tell you?

A. He said he doesn't know Dee.

Q. He said he doesn't know Dee?

A. Yes.

Q. Did he tell you that he goes by Dee?

A. No.

Q. And, now, is it your agency's policy to just let a child that was in [L.P.]'s condition just leave the school –

A. No.

Q. – with Darius Clark?

A. No.

Q. And how was it that [L.P.] was able to just walk out of that daycare center with Darius Clark?

A. We were sitting at the table. I was on the phone with my supervisor speaking about the situation. I informed Mr. Clark that due to the current circumstances there's some real issues we [631] need to still further discuss, that I need you to sit down and, you know, please give me the time to talk, you know, to hear about the situation. We need to also reach mom.

He said, I don't have no time for this. I'm about to go. He stepped – because he was already standing the whole time. He never sat down.

Q. He wouldn't sit down with you?

A. No.

Q. And where was [L.P.] while you were talking with Darius Clark?

A. [L.P.] was still playing with his toys. You know, he was kind of wrapping up. We told him to clean it up, and he was putting on his coat or jacket.

Q. And while you were on the phone with your supervisor, what then happened?

A. While I was on the phone with my supervisor, that's when he – again, he stepped forward, grabbed the child, stepped forward and said he didn't have any time for this. I'm about to go.

I said, Hold on. We still have to speak about these concerns. I got up from my seat, stepped to the right – because the table was there – stepped to the right. He came forward. We had, you know, kind [632] of a stare-down.

Q. "A stare-down," what do you mean by that?

A. Well, more so of trying to get him to stop to leave, trying to stop him from leaving because I need to still talk to you. He's saying – you know, he basically said that he wasn't going to talk to anyone, that he was trying to leave, basically.

So we kind of made eye contact with each other. Basically came to a standstill. He kind of went around me through the door. I followed with my supervisor on the phone, you know, asking what – I didn't want to get into a physical altercation, so –

Q. And what did you see Mr. Clark do then?

A. I saw a car parked in the front of the daycare. He proceeded to leave out the door and got straight into the car.

Q. Were you able to get any information about that vehicle?

A. No.

Q. And once Mr. Clark took off with [L.P.], what did do you?

A. After he took off, I'm still talking to my supervisor. And I went around – I actually went around the corner to the family's home to see if mom was there or any other adult was there, and that was [633] unsuccessful. No one was there. Left some material for the family to get back in contact with me.

Q. And did you ever hear from the family?

A. No.

Q. And did that conclude your involvement with this portion of the investigation regarding [L.P.]?

A. Yes.

Q. And do you see the person here in the courtroom today who you spoke with at that daycare center who identified himself as Darius Clark?

A. Yes.

Q. Could you point him out for us and describe what he's wearing?

A. He's wearing a maroon tie, white shirt.

THE COURT: The record may reflect that the witness pointed to and identified the defendant in court.

MS. KARKUTT: Thank you, Your Honor. I have nothing further.

THE COURT: Cross-examination? Step up for just a minute, Counsel.

* * *

(Thereupon, a discussion was had [634] between Court and counsel at sidebar.)

* * *

(Thereupon, the following proceedings were had in open court in the presence of the jury.)

* * *

THE COURT: You may proceed.

MR. MORGAN: Thank you, Your Honor.

* * *

CROSS-EXAMINATION OF HOWARD LITTLE

BY MR. MORGAN:

Q. Good morning, Mr. Little.

A. Good morning.

Q. A couple questions for you. You responded to William Patrick Day preschool?

A. Yes.

Q. And this is on March 17th?

A. Yes.

Q. You see [L.P.] there, correct?

A. Yes.

Q. Okay. You had an opportunity to talk to [L.P.], correct?

A. Yes.

[635] Q. All right. He's a three-and-a-half-year old at the time?

A. Yes.

Q. Typical three-and-a-half-year old?

A. Uh-huh.

Q. Okay. You talk to him about some bruises, correct?

A. Right.

Q. You also talk to him, and he responded about a spanking right?

A. Yes.

Q. Then in that same conversation you said, Who did this, right?

A. Yes.

Q. Okay. Do you know if he was responding as far as a spanking or responding as to "this"?

A. He was responding as far as the spanking.

Q. As a spanking?

A. Yes.

Q. So at least in your mind – when he said Dee did this, in your mind, he was responding to a spanking, correct?

A. Yes.

MR. MORGAN: Nothing further. Thank you.

[636]THE COURT: Any redirect on that issue?

MS. KARKUTT: No questions, Your Honor.

THE COURT: You may step down, sir. State may call your next witness.

TESTIMONY OF
DETECTIVE JODY REMINGTON

[600]

* * *

DIRECT EXAMINATION OF DETECTIVE JODY REMINGTON

BY MS. KARKUTT:

Q. Detective, could you state your name and spell your last name for the record?

A. My name's Jody, J-o-d-y; last name is Remington, R-e-m-i-n-g-t-o-n; Badge 2164.

Q. And where are you employed?

A. I'm employed by the City of Cleveland under the Department of Safety in the Division of Police, and my assignment is the sex crimes and child abuse unit.

Q. How long have you been assigned to that unit?

A. It will be six years on January 26th of 2011.

Q. And prior to your experience in the sex crimes and child abuse unit, where were you assigned within the City of Cleveland Police Department?

A. Originally, my first assignment was in the Second District on basic patrol, Zone Car 212. I worked afternoon shift. I worked there about two and a half years, and then I went into a unit called [601] Strike Force, which handled like creature comfort issues, burglaries, B and Es. Anything that residents in the neighborhood had an issue with, we would handle.

From there, I went to the Second District detective bureau. And when I worked there, I handled general felonies, burglaries, B and Es, auto thefts, things like that.

And I went to sex crimes in 2001 for a very brief period of time. While I was assigned there, I was pregnant with my daughter; and I went back to the detective bureau until she was about three years old, and then I came back here to sex crimes.

Q. Detective, how do you receive your cases in your unit?

A. Sex crimes is one of the units within a city that's centralized. We're out of downtown along with narcotics and homicide. And each of the districts across the city will make a report. It comes down to our unit. Our supervisors log that assignment, and then they distribute them to the detectives for further investigation.

Q. Did there come a time in March of 2010 where you received an assignment regarding the investigation of Darius Clark?

[602] A. Yes.

Q. How did this particular case come to your attention?

A. Well, I was aware of the case by virtue of Social Worker Bolog.

Q. And is that typically how you receive your assignments?

A. No.

Q. This is somewhat of an unusual situation?

A. Yes.

Q. How did you first become involved or aware that your involvement would become necessary?

A. Well, I was made aware by Social Workers Bolog that she had a missing child, and that was [L.P.]. So she had contacted me a number of times via my cell phone and told me that she had gone to the school, to [L.P.]'s home. She couldn't find the child. She couldn't find the child's mother. She was very concerned.

Q. What date was this?

A. The first time I had a conversation with her about it was St. Patrick's Day.

Q. And then the second time?

A. The second time would have been, I think, Thursday the 18th. She still had questions inasmuch [603] as she still couldn't find the children. She was checking various different addresses across the city. And I was actually off duty driving to pick up my daughter when I got an actual phone call from her, and she indicated that the case was worse than we originally thought –

MR. MORGAN: Objection.

THE COURT: That will be sustained as to what she said. You may testify as to what you did.

Q. At that point in time, was your presence requested anywhere?

A. She didn't request my presence, but I indicated that I thought she should call a zone car for her safety, because social workers are just like the general public

in these homes. They don't have any means of protection. So I suggested she call a zone car. And then I contacted my supervisor, and I told him he needed me to come back into work I would do that, which is what I did.

Q. Did there come a time that day – now, are we talking March 18th?

A. Yes, ma'am.

Q. Did there come a time that day when you responded to MetroHealth Hospital?

[604] A. Yes. I responded to Metro probably somewhere in the neighborhood of about 6:00 in the evening.

Q. And what did you find when you arrived at MetroHealth Hospital?

A. Well, at that point, I learned what had been indicated, that there were two children involved.

MR. MORGAN: Objection.

THE COURT: I'll let that answer stand. Proceed. Put another question to the witness.

Q. And, Detective, did you have an opportunity to observe these children when you arrived at Metro?

A. Yes, I did.

Q. And what were the names of these children?

A. [L.P.] was the little boy. He was about three years old. And then there was a female child named [A.T.]. She was somewhere around 15 to 18 months.

Q. And when you arrived, who were these children with at Metro?

A. By the time I arrived, Schoen Parries, which is the grandmother – that's [T.T.]'s mother – was there; and then Jackie Strozier, who is mom's sister – both of them were in the room with the children.

[605] Q. And did you have an opportunity to observe these children, interact with their family members?

A. I did.

Q. And did you have an opportunity to interact with these children yourself?

A. I did.

Q. In what nature?

A. Well, initially, I just tried to build some rapport with them, because they were clearly traumatized.

Q. When you say "clearly traumatized," how do you mean?

A. No one could touch [A.T.] with the exception of Jackie Strozier. Nobody could go near her or touch her without her reacting in a negative way.

Q. And when you say "no one," doctors, nurses?

A. No one. She was literally stuck onto Jackie Strozier. You couldn't touch her at all.

Q. And how did you interact with [L.P.]?

A. I tried to talk to [L.P.]. I had a little – like a Beanie Baby from my daughter. It was a little pink poodle, and I tried to play with him to build some

rapport. I wanted to see if he would tell me who hurt him.

[606] Q. And did that work?

A. No. Not at all.

Q. And how was he reacting to you?

A. As long as we played, he was okay. He was pretty enamored with my badge, like most little boys are. So I gave him the badge, and I told him I'm the police, and I'd like to help you. I'd like to make sure nobody ever hurts you like this again. Can you tell me who hurt you?

Q. Was he able to do that?

A. He was not.

Q. And when he wasn't able to answer that question, what did you do next?

A. Well, my supervisor, Sergeant Joe Rini, was there; and Detective Kovach was with me. So the three of us talked in the hallway, and we decided that I would go to the Second District and I would print out a picture of the suspect's OHLEG photo, your Ohio driver's license photo, and bring it back and see if the child could make an identification.

Q. At that point in time, what name did you have for a suspect?

A. It had been indicated to me that the individual responsible for [L.P.]'s injuries was Dee.

[607] MR. MORGAN: Objection.

THE COURT: I will sustain that answer.

Q. When did you first hear the name or when did a person named Darius Clark come into your investigation?

A. Immediately. It came to me through Social Worker Bolog, and she had learned that information from both from –

MR. MORGAN: Objection.

THE COURT: I'll let that stand. The rest will be sustained.

Q. And when you went to the Second District to print out an OHLEG photograph of your suspect, who was that?

A. Darius Clark.

Q. And once you printed out that photograph, what did you do?

A. I came back to Metro Hospital with it.

Q. And what did you do with that photo when you got to Metro Hospital?

A. I went back into the room with the children, and I showed it to Darius [sic].

Q. And what was Darius's reaction when you showed it to him?

[608] MR. MORGAN: Objection.

THE COURT: Overruled.

MR. MORGAN: May I approach?

THE COURT: All right. Approach the bench.

* * *

(Thereupon, a discussion was had between Court and counsel at sidebar.)

* * *

(Thereupon, the following proceedings were had in open court in the presence of the jury.)

* * *

THE COURT: Question's withdrawn, and a new question will be put to the witness.

Q. Detective, what happened when you showed [L.P.] that photograph of Darius?

A. He made a statement.

Q. And what did he say?

A. "That's Dee."

Q. And were you able to make a connection to any other information that you had gather in the course of your investigation?

[609] A. Well, I knew from other Cleveland police reports that Darius had an alias of "Dee," or people referred to him as "Dee."

MR. MORGAN: Objection, Your Honor.

THE COURT: Yes. That will be sustained. The jury will disregard about other police reports.

Q. And once you got that information from [L.P.], what did you do next?

A. I still tried to see if the child could disclose to me. But after that, I called for an SIU car.

Q. And what's SIU?

A. It's scientific investigation. And they have cameras. And I wanted the children's injuries to be captured in photographs.

Q. And someone from your department arrived?

A. He did.

Q. And did you observe him photographing those injuries?

A. I did.

Q. And then once that was compete, what did you do?

A. I still tried to build – I spent a lot of [610] time with the children that evening. And once we were competed there, I went back to the justice center and conferred with my supervisor.

Q. And after you conferred with your supervisor, what was your next step in this investigation?

A. Well, I tried to contact both individuals, [T.T.] and Darius Clark. I also went to Darius's mother's house to attempt to make contact with her. It was indicated in the investigation that Mr. Clark had left town.

MR. MORGAN: Objection.

THE COURT: Overruled.

Q. Now, during this time, was [T.T.] also a suspect?

A. Yes.

Q. And were you able to locate [T.T.]?

A. Well, inasmuch as we had phone conversations.

Q. You talked to [T.T.] on the telephone?

A. I did.

Q. And were you able to ascertain her location?

A. Well, she told me she was in Washington D.C.

Q. And when was your first initial contact with [T.T.]?

A. I don't' know the exact date. It would have been somewhere between March 18th and March 26th. [611] Because on the 26th, at that point, I finally consulted a prosecutor and issued warrants for their arrests. I gave them an opportunity to come in and discuss the injuries; and they didn't, so I issued a warrant.

Q. And that was just in the very beginning of your investigation, correct?

A. Yeah. We're about a week in at that point.

Q. All right. And after you issued warrants, are you still trying to make some contact with [T.T.]?

A. Well, at that point, we were having more regular phone conversations.

Q. And what do you mean by that?

A. Well, she would call my office fairly frequently.

Q. And how frequent is frequently?

A. Every day of so I would get a phone call.

Q. And what was her reason for contacting you?

A. To find out what was the status of the case and where were the children, were the children safe, things of that nature.

Q. And did you ever have discussions about her coming into your office?

A. Well, every time we talked, I suggested she [612] come have a cup of coffee with me.

Q. And did she ever do that?

A. Not until most recently.

Q. And how was that you ended up having a physical face-to-face interaction with [T.T.]?

A. I believe she turned himself in, in Washington, and then as extradited back to Cleveland.

Q. Did you have to go to D.C. to get her?

A. No.

Q. Or did they bring her back here?

A. They brought her back here.

Q. And did she come in and meet with you at your office at that time?

A. Yes.

Q. And when you had issued warrants for her arrest, she had been charged; is that correct?

A. Correct.

Q. The other suspect in this case, Darius Clark, he had also been charged at that point in time, correct?

A. Correct.

Q. Now, let's back up a little, Detective. When you were at Metro Hospital, did you have an [613] opportunity to observe any markings that were left on [L.P.] and [A.T.]?

A. I did.

Q. And while your SIU detective was taking the photographs, what are you doing?

A. I was actually probably there in the bed or close to bed. I sat on the bed with the kids when I was trying to build some rapport with them. But [A.T.], for the most part, sat on Jackie Strozier's lap. [L.P.] was a little bit interactive with me because he had my badge, but by no means were these children comfortable with anyone but their family.

Q. And did you provide any assistance to your SIU detecting in directing them which areas of the children needed to be photographed?

A. Yes.

Q. And how were you able to do that?

A. Well, I had observed the injuries myself, so I indicated to him what I thought were non-accidental trauma injuries to these children.

Q. And how was it that you had the opportunity to view their injuries?

A. I had come in when the doctor was examining them.

[614] Q. What other assistance did you provide in this investigation once you left Metro Hospital?

A. Well, they actually went and arrested Darius Clark.

Q. And you said initially that you had to issue a warrant for him; is that right?

A. Right.

Q. So did you know where you could find Mr. Clark?

A. Well, not initially.

Q. And at some point in time, you received some information that provided some assistance in locating him?

A. I did.

Q. Where did that information come from?

A. Well, it came from a family member that preferred not to be identified.

Q. A family member of whom?

A. Mr. Clark.

Q. And ultimately where did you go and arrest Mr. Clark?

A. I believe it was at his sister's home.

Q. And in the City of Cleveland?

A. Correct.

Q. Any Cuyahoga County?

[615] A. Yes, ma'am.

Q. Do you recall the address or anything like that?

A. I don't recall the exact address. It was in the First District.

Q. And what date did you take Mr. Clark into custody?

A. I believe it was April 8th.

Q. 2010?

A. Yes, ma'am.

Q. And then you transported him to the Cleveland Police Department, correct?

A. I did.

Q. And was that before or after you were able to meet face to face with [T.T.]?

A. Before.

Q. And when was it that [T.T.] finally came into your office?

A. [T.T.], I believe I interviewed her around the end of October, beginning of November.

Q. 2010?

A. 2010. I'm sorry.

Q. So Mr. Clark came in front of you much more quickly than [T.T.] had?

A. Correct. Not by choice, but –

[616] MR. MORGAN: Objection.

THE COURT: I'll sustain the objection. Wait for the question,

Q. And during the course of your investigation, Detective, what other individuals did you go out and

seek information from or evidence with respect to this case?

A. I interviewed the teachers at [L.P.]'s school.

Q. When did you conduct those interviews?

A. I don't know the date. I'd have to look at the top of the statements, but it was – I don't know the date. I'm sorry.

Q. Those were just a day or two after you were at Metro Hospital with the children, correct?

A. Yeah. I'd have to look at the top of the statements to tell you the exact date. I know I interviewed Ramona Whitley, and my partner interviewed the other teacher that was involved.

I went to Hazel's house around the end of March. That would have been around March 30th. I think it was a Tuesday. And we heard the voice recording at that time, had an opportunity to observe [A.T.] that day. And then my partner –

Q. I'm sorry. Let me back you up. [617] You had an opportunity to see [A.T.] that day?

A. I did.

Q. She was at Hazel's home?

A. Yes.

Q. And what did she look like on March 30th when you were there?

A. Well, she was happy. It was refreshing to see her.

Q. Was her demeanor any different than it was on March 18th when you first interacted with her at Metro Hospital?

A. Yes. It was much different.

Q. And in what way?

A. She was more outgoing. She actually came to me as opposed to at Metro, she was scared and you couldn't touch her at all. No one could touch any part of her body. At her grandmother's house, she came to me, and it was very refreshing.

Q. Did you have an opportunity to view any of the injuries that you had initially seen on [A.T.] on March 18th?

A. Only the injuries on her face seemed to be resolving.

Q. And when you say "resolving," what do you mean [618] by that?

A. They were healing.

Q. Were they still visibly apparent to you?

A. Yes.

Q. But they were on their way to healing?

A. Yes.

Q. And that was 12 days after you first viewed those injuries, correct?

A. Correct.

Q. You indicated that if you had an opportunity to look at Ramona's statement you'd be able to determine the date of that interview, correct?

A. I could. I also interviewed [T.T.]'s sister. I think her name was Tara Weary. The mother, Jackie Strozier. All the individuals that are involved in this case, I interviewed them with respect to the case.

Q. And what was the purpose of interviewing each one of those individuals?

A. Really, to develop a timeline for when these injuries might have been inflicted; or when was the last time you saw these children and they were okay versus today when I see them and they're certainly not okay.

Q. And interviewing each one of these individuals [619] was able to help you piece that together; is that correct?

A. Right.

Q. I'm showing you what's been marked for identification purposes as State's Exhibit 64. Do you recognize that?

A. This is the statement that I took from Ramona Whitley. I took it March 19th at about 1153 hours in the sex crimes unit.

Q. And does that refresh your recollection as to the date?

A. Yes. It was the day after I seen the children at the hospital. She came in.

Q. Did you ever have an opportunity to go out to the school at all?

A. No.

Q. Now, you had an opportunity to see [A.T.] after that day at Metro Hospital. What about [L.P.]?

A. I hadn't seen Shoen until I saw him a few days ago here.

Q. And, Detective, once you had both of your suspects, [T.T.] and Darius Clark, in your custody, did that conclude your involvement in the investigation until these court proceedings?

[620] A. Yeah. I think it did. I think so. Yes.

Q. Thanks, Detective.

A. You're welcome.

MS. KARKUTT: Nothing further.

THE COURT: For cross-examination, Mr. Morgan.

MR. MORGAN: Thank you, Your Honor.

* * *

CROSS-EXAMINATION OF DETECTIVE JODY REMINGTON

BY MR. MORGAN:

Q. On the 18th, you took a photo [transcript illegible] lient out to the hospital, correct?

A. I did.

Q. Okay. Photos of anybody else?

A. No.

Q. And I think you testified that he said that's Dee, right?

A. He did.

Q. At the hospital on the 18th, you were there and you had called SIU, Scientific Investigative Unit?

A. I did.

Q. Okay. And they're the wing of the Cleveland Police Department that has the cameras and takes [621] pictures of everything, correct?

A. Correct.

Q. Okay. So you called them, and they came out and took a battery of pictures, correct?

A. Correct.

Q. And they took those pictures at your direction?

A. Correct.

Q. Okay. Is that all that has to be done to get SIU to come out, is just a phone call, or is there further proceedings – procedures to have them come out?

A. No, there's not. My supervisor called for them.

Q. Thank you.

A. You're welcome.

THE COURT: Any redirect?

MS. KARKUTT: Not based on that. No.

THE COURT: You may step down.

THE WITNESS: Thank you.

THE COURT: Call your next witness, please.

PETITIONER'S BRIEF

No. 13-1352

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Does a daycare teacher's obligation to report suspected child abuse make that teacher an "agent of law enforcement" for purposes of the Confrontation Clause?

2. Do a child's out-of-court statements to daycare teachers in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

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OPINIONS BELOW

The Ohio Supreme Court's order denying reconsideration, *State v. Clark*, 999 N.E.2d 698 (Ohio 2013), is reproduced at Pet. App. 49a. The Ohio Supreme Court's opinion, *State v. Clark*, 999 N.E.2d 592 (Ohio 2013), is reproduced at Pet. App. 1a. The Eighth District Court of Appeals' opinion, *State v. Clark*, No. 96207, 2011 WL 6780456 (Ohio Ct. App. Dec. 22, 2011), is reproduced at Pet. App. 51a.

JURISDICTION

The Ohio Supreme Court entered judgment on October 30, 2013. It denied Ohio's motion for reconsideration on December 24, 2013. On March 13, 2014, Justice Kagan granted a 45-day extension of time to file a petition for writ of certiorari. Ohio timely filed its petition on May 8, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him."

Section One of the Fourteenth Amendment provides: "No State shall deprive any person of life, liberty, or property, without due process of law."

Ohio reproduces relevant portions of Ohio Rev. Code § 2151.421 (its child-abuse reporting statute) in an appendix to this brief.

STATEMENT

A. Darius Clark Assaulted His Girlfriend's Two Small Children

In early 2010, Respondent Darius Clark lived in Cleveland with his girlfriend, T.T., her three-and-a-half-year-old son, L.P., and her one-and-a-half-year-old daughter, A.T. Trial Tr. ("Tr.") 451-52; JA153, 158. Clark has gone by the nickname "Dee" since his childhood. Tr. 557, 677. He and T.T. began living together in 2008. Tr. 532-33. Clark did not hold a job then or thereafter. Tr. 534, 674. When T.T.'s employer fired her in 2009, T.T. testified, Clark acted as her pimp and persuaded her to earn money by traveling to Washington D.C. to engage in prostitution. Tr. 532-36. T.T.'s grandmother initially watched T.T.'s children during these trips, but Clark took over once T.T.'s family discovered their purpose. Tr. 537. T.T.—admittedly described as a liar even by her mother, Tr. 462—testified that Clark had not harmed her children before she began taking these trips, but had "slapped [her] a couple times, punched [her] a couple times," and "told [her] if [she] ever [left] him he'd kill [her]." Tr. 538-39.

In February 2010, T.T. and her children attended a family party. Tr. 450-51. Family members suggested that the children looked fine, but T.T.'s mother noticed bruises on A.T.'s chest. Tr. 425, 458-59. She expressed concern to T.T., who said her kids were safe with Clark. *Id.* At that time, T.T. claimed that L.P had caused A.T.'s bruising. Tr. 541. According to T.T.'s mother, however, L.P told her "Dee did it." Tr. 459.

On March 8, 2010, T.T. testified, she visited a Cleveland-area friend, and Clark watched her chil-

dren for a few days. Tr. 543-44. By March 12 or so, Clark left an agitated voicemail with T.T.'s grandmother saying "[i]f you want these kids, you better hurry up and get them." Tr. 403, 598-99. T.T.'s family contacted her. Tr. 403-04, 545. When T.T. picked up her children, she noticed that A.T. had burn marks on her face, arm, and chest. *Id.* Clark claimed the burns were accidental. Tr. 545-47.

In February or March 2010, L.P. began attending the William Patrick Day Head Start Center, operated by the Council for Economic Opportunities of Greater Cleveland. JA25-28. Debra Jones, the lead teacher, and Ramona Whitley, an assistant, taught the class from 1:00 p.m. to 4:30 p.m. JA25-26, 29, 39-40, 54-55. On March 16, T.T. picked up L.P. from school, and conversed with his teachers about chalk dust in his hair. JA28-29, 31, 66-67; Tr. 549. The teachers recalled that L.P. looked fine that day; he had no marks on his face. JA31, 66-67. T.T. left for Washington late that night, placing her children in Clark's care. Tr. 548-49.

The next afternoon, March 17, Clark took L.P. to school. JA34-35. While in the lunchroom, Whitley noticed, L.P. acted more reserved than usual and refused to eat. JA37, 44. On closer inspection, L.P.'s eye appeared "bloodshot" or "bloodstained." JA34. Whitley asked, "What happened?" JA27. L.P. initially said nothing, then "I fell." *Id.* Whitley did not think much of it in the lunchroom. *Id.*

In the brighter classroom setting, however, Whitley noticed that L.P.'s face had welts and red marks from "whips of some sort." JA27, 33-34. On seeing these more extensive injuries, Whitley was "kind of like in shock." JA27. She again asked L.P., "Oh, what happened?," alerting the lead teacher, Jones.

JA27, 45. On seeing L.P., Jones too asked, "Whoa, what happened?" and "Who did this?" JA27, 59. L.P. "seemed kind of bewildered" and "said something like, Dee, Dee." JA59; *see* JA46. The teachers did not know what L.P. meant. JA59. Thinking that another child might have harmed L.P., Jones asked whether Dee was "big or little." JA60-61. L.P. responded "Dee is big." JA64.

Jones took L.P. to her supervisor. *Id.* The supervisor lifted L.P.'s shirt, revealing more injuries. JA65-66. She determined that the first person to observe L.P.'s injuries should "make the call" to the Cuyahoga County Department of Children and Family Services to report child abuse. JA65. Whitley called the child-abuse hotline, 696-KIDS. JA35.

A social worker, Howard Little, arrived at the daycare. JA144. Little asked L.P questions while playing with toys. JA145-46. L.P initially told Little that he had fallen, but "later stated that the bruises came from Dee." JA146. When Clark arrived, he claimed that he "knew nothing about" the injuries, then that he had last spanked L.P. a week ago, and then that L.P. "had gotten [the injuries] from playing outside because he lives in the projects." JA147-48. Little asked if anyone in his house went by "Dee"; Clark said "he doesn't know Dee." JA149. Ultimately, Little told Clark "there's some real issues we need to still further discuss," and called his supervisor. JA150. While Little conversed with his supervisor, Clark said "I don't have no time for this" and started leaving with L.P. *Id.* Little and Clark had "kind of a stare-down," but Little allowed him to pass to avoid a fight. JA150-51. Clark drove off before Little could record his car's information.

Id. Little went to L.P.'s known residence, and left material for the family to contact him. JA151.

That night, another social worker, Sarah Bolog, left additional material. JA92. She spoke with T.T. over the phone the next morning, March 18. T.T., still in Washington, claimed to be at a health center with her kids because L.P had pinkeye. JA94. Bolog knew T.T. was lying because she had alerted area health centers to contact social workers if T.T. or her children arrived. JA95-96. Bolog eventually obtained the phone numbers for T.T.'s mother and grandmother, and they suggested she look for Clark at his mother's home. JA96-98.

Accompanied by her supervisor, Bolog drove to that house and found T.T.'s children in the care of teenagers. JA99-100. When Bolog saw the kids, she knew she had a "very serious situation." JA102; *see* JA100-03. On top of L.P.'s injuries, A.T. had two black eyes and a large burn on her cheek. JA102. One hand, swollen badly, was largely unusable and "very cold." JA106, 111. Two "pigtails" in A.T.'s hair had been "ripped out at the root," JA106, which led to a staph infection, Tr. 434-35. Bolog called 911 out of concern for her safety; she also contacted a child-abuse detective. JA103. The police arrived, summoning EMS to take the children to the hospital. Tr. 193, 197. An emergency-room doctor treated the children and documented their injuries. Tr. 313-59.

The children's great aunt and grandmother met Bolog at the hospital. Tr. 423-24, 456. Their great aunt fought back tears on seeing them. Tr. 424. A.T. was bruised and burned in multiple places, including from a cigarette. Tr. 424, 436-38, 457. L.P. had a black eye, marks from a belt on his stomach and back, and bruises over his body. Tr. 424-25, 430-35.

The children were placed in their great aunt's care. Tr. 423. Sometime later while resting in her lap, L.P. told her "Dee did it." Tr. 431. He said the same to his grandmother. Tr. 460.

By trial, A.T. had scars from her burn marks, Tr. 434; L.P. continued to receive counseling and complain of headaches, Tr. 441. L.P.'s grandmother said that, "[m]entally, he's really messed up." Tr. 457.

B. A Jury Convicted Clark, But The State Appellate Courts Reversed

1. A grand jury indicted Clark on five counts of felonious assault (one count related to L.P., the others to A.T.), two counts of endangering children (one count each for L.P. and A.T.), and two counts of domestic violence (one count each for L.P. and A.T.). Tr. 6-7. T.T. was indicted on similar charges. Tr. 566. She testified against Clark after pleading guilty to child endangerment, domestic violence, and permitting child abuse. Tr. 531-91.

Before trial, the court held a competency hearing for L.P. JA5-12. The prosecution asked him questions relating to where he went to school, his birthday, who he lives with, and the like. *Id.* After this questioning, the court found L.P. "not competent to testify" based on "his demeanor," which was "perfectly understandable" given his young age. JA12.

Clark moved to preclude testimony about L.P.'s out-of-court statements identifying "Dee." JA13-19. His counsel conceded that "[i]f *Crawford* [*v. Washington*, 541 U.S. 36 (2004)] wasn't around, I'd have no argument" because Ohio R. Evid. 807 allows reliable statements from children in abuse cases. JA13. But he argued that the Confrontation Clause prohibited L.P.'s statements because they were testimonial

and he could not cross-examine L.P. JA13-14, 16-17. The prosecution responded that L.P.'s statements were non-testimonial and admissible under Ohio R. Evid. 807. JA14-16.

The court denied Clark's motion. JA20-24. It concluded that L.P.'s statements satisfied Ohio R. Evid. 807 because "the totality of circumstances surrounding the making of the statement[s] here provide particular guarantees of trustworthiness." JA21-22. The court also found that L.P.'s statements implicating "Dee" were non-testimonial, and so permitted testimony about them from his teachers, JA46, 60, the social workers, JA128, 146, and his great aunt and grandmother, Tr. 431-32, 460.

Clark's main defense was that T.T. abused the children. His witness, a friend, suggested she saw T.T. hitting them back in 2009. Tr. 671.

The jury found Clark guilty on all counts but one assault count related to A.T.'s injuries. Tr. 770-73. The trial court sentenced Clark to 28 years' imprisonment. Tr. 790.

2. Ohio's Eighth District Court of Appeals reversed. Pet. App. 52a. It treated L.P.'s statements to the social workers (at the school, at Clark's mother's house, and at the hospital) as testimonial because the workers were "part of the preliminary investigation to aid law enforcement" and were not "made in the midst of a police emergency" or for "medical treatment or diagnosis." Pet. App. 60a-62a. It held that L.P.'s statements to his teachers were also testimonial because "the primary purpose of Jones and Whitley questioning L.P. was to report potential child abuse to law enforcement." Pet. App. 63a. (The court also identified a police officer as tes-

tifying that L.P. identified Clark as his abuser. Pet. App. 58a. But the officer said that L.P. did not tell her who abused him, JA160, only that L.P. identified Clark's picture as "Dee," JA162, 172-73.)

The court separately considered whether L.P.'s statements to his family were admissible under Ohio R. Evid. 807. Pet. App. 63a. It held that the trial court abused its discretion in admitting the statements because they "lacked the 'particularized guarantees of trustworthiness'" required by the rule. Pet. App. 66a-68a.

3. Ohio appealed to the Ohio Supreme Court the holding that L.P.'s statements to his teachers were testimonial. The Ohio Supreme Court affirmed by a 4-3 vote. Pet. App. 17a. The majority recognized that the Confrontation Clause applies only to "testimonial" statements. Pet. App. 2a, 10a-15a. It noted that this Court had "enunciated the primary-purpose test to determine whether a statement made to a law-enforcement officer or an agent of law enforcement in the course of an investigation is testimonial." Pet. App. 2a. Under that test, statements are testimonial if their purpose is "'to establish or prove past events potentially relevant to later criminal prosecution.'" Pet. App. 3a (citation omitted).

The majority held that this primary-purpose test applied because L.P.'s teachers were police agents. Pet. App. 6a-9a. "Ohio law imposes a duty on all school officers and employees, including administrators and employees of child day-care centers, to report actual or suspected child abuse or neglect." Pet. App. 6a (citing Ohio Rev. Code § 2151.421). The majority recognized that "'the primary purpose of reporting is to facilitate the protection of abused and neglected children rather than to punish those who

maltreat them.'" Pet. App. 7a (citation omitted). But "'the General Assembly considered identification and/or prosecution of the perpetrator to be a necessary and appropriate adjunct in providing such protection, especially in the institutional setting.'" Pet. App. 7a-8a (citation omitted). "At a minimum," then, "when questioning a child about suspected abuse in furtherance of a duty pursuant to [Ohio Rev. Code §] 2151.421, a teacher acts in a dual capacity as an instructor and as an agent of the state for law-enforcement purposes." Pet. App. 15a.

The majority next held that the primary purpose of L.P.'s statements to his teachers rendered them testimonial. Pet. App. 8a-9a. It found that no ongoing emergency existed when L.P made the statements. Pet. App. 15a-16a. L.P. had not complained about his injuries and, the majority reasoned, did not need "emergency medical care." Pet. App. 15a. Accordingly, it concluded that the teachers acted only "to fulfill their duties to report abuse." *Id.* The majority also characterized the interaction between L.P. and his teachers as "a formal question-and-answer format," which "sought facts concerning past criminal activity to identify the person responsible." Pet. App. 16a. It described that interaction as "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Id.* (internal quotation marks omitted).

The dissent began by criticizing the majority's reliance on this Court's cases because they left open whether the Confrontation Clause governs statements to private individuals. Pet. App. 24a-25a. (The Ohio Supreme Court, by comparison, had held that "statements made to someone other than law-enforcement personnel" should be considered non-

testimonial unless "an objective witness would reasonably believe that the questioning served primarily a prosecutorial purpose." Pet. App. 26a.)

The dissent next criticized the idea that the teachers' reporting duty made them police agents. Pet. App. 30a-39a. The teachers were employed by the Council for Economic Opportunities of Greater Cleveland, and police did not influence their questions. Pet. App. 30a-31a. There was, moreover, "no indication that the General Assembly intended to deputize mandatory reporters as agents of law enforcement." Pet. App. 35a. Instead, "the primary purpose of reporting is to facilitate the protection of abused and neglected children." Pet. App. 33a.

Under Ohio's objective-witness test, the dissent found, "[a]n objective witness would reasonably believe that the teachers' questions enabled them to adequately assess the risk of harm for both L.P and the other children at the school." Pet. App. 42a. L.P.'s statements were made in the classroom, "the questioning was informal and spontaneous," and the teachers were unsure whether "L.P.'s injuries were a result of abuse or of an accidental injury from playing with another child." Pet. App. 40a-41a. The teachers asked L.P what happened "to understand how he had been injured" and "maintain a secure and orderly classroom." Pet. App. 42a. Their questions were "not to create evidence" for trial. *Id.*

SUMMARY OF ARGUMENT

I.A. For three reasons, the Court should hold that the Confrontation Clause does not apply to statements meant *solely* for private parties without *any* police direction. *First*, that view comports with the Confrontation Clause's textual focus on "witness"

testimony. Unlike with prior in-court testimony or custodial police interrogation, individuals do not "bear testimony" when they speak to friends, coworkers, or teachers. The Court has recognized this point in many settings, ranging from statements to friends about abuse to prison-yard conversations.

Second, the Confrontation Clause's purpose illustrates that statements made to private parties fall outside the clause. The Confrontation Clause halted the civil-law method of criminal procedure (a method used against colonial Americans in admiralty courts) by which justices of the peace examined witnesses, recorded their answers, and used that written testimony at trial. Unlike the use of statements made during custodial police interrogation (which resembles this abuse), a witness's testimony about a private conversation is far afield of it.

Third, the judiciary's traditional method of regulating statements between private parties confirms that they do not pertain to a constitutional right. Courts long regulated those statements under evidentiary rules *equally* applicable in criminal and civil trials, not confrontation rules applicable *only* in criminal trials. The common-law evolution of private-party hearsay standards also shows that courts viewed the standards as rooted in *changeable* rules of evidence, not *rigid* rules of confrontation.

B. At the least, statements to private parties by a child found too young to testify are non-testimonial. When a State's competency rules track the Confrontation Clause's testimonial rules (asking whether an individual can make solemn statements at trial), an incompetency finding shows that the out-of-court statements could not have been "witness" testimony. That conclusion comports with history. The common

law long allowed private parties to testify about statements from young children.

C. The conclusion that a young child's statements to a private party are non-testimonial does not open the door to trial by private-party hearsay. Hearsay rules backed by a general due-process check still regulate those statements. That makes good sense. Hearsay rules, not the Confrontation Clause, police reliability. And leaving private-party statements to hearsay rules allows for democratic evolution of those rules, an important benefit in child-abuse cases that are notoriously difficult to prosecute.

II. The Ohio Supreme Court mistakenly treated L.P.'s teachers as police agents because Ohio requires teachers to report child abuse. Both history and modern analysis confirm that teachers are not police agents. Reporting duties are nothing new. The common law recognized a general duty to report crime; this duty did not turn all citizens into public officers. Nor are reporters anything like the justices of the peace whose criminal investigations led to the clause. The statute creates merely a duty to *report*, not a duty to *investigate*. And the statute does not even require mandatory reporters to call police. It permits reports to social workers because it is primarily about protecting children, not prosecuting criminals. Finally, even if the teachers acted according to this duty, it is implausible that L.P. knew anything about the duty when conversing with them.

Related constitutional provisions point the same way. Under the Fourth Amendment, reporting laws do not turn reporters into police agents. This Court, for example, distinguished reporting laws like Ohio's that merely require reports of facts uncovered in the course of medical treatment from a hospital policy

requiring a search *specifically* for a criminal purpose. Lower courts, too, have rejected the notion that reporting duties turn private searches into government searches. Under the Fifth Amendment, courts have declined to equate mandatory reporters with police for purposes of their conversations with potential child abusers; the courts have thus found that reporters need not give *Miranda* warnings. Under the Sixth Amendment's right to counsel, courts have refused to treat prison informers as government agents when they converse with fellow prisoners merely because of a general reporting duty.

III. Even under the primary-purpose test applicable to police interrogations, L.P.'s statements were non-testimonial. Under that test, the totality of the circumstances determines whether a statement qualifies as a substitute for trial testimony. Three factors guide this inquiry: the questioner's perspective, the declarant's perspective, and the environment in which they spoke.

Here, the totality of the circumstances shows that L.P did not make his statements to create evidence. As for the teachers, they acted to protect L.P and secure the classroom. That is made plain by their question whether Dee was big or little. As for L.P., the Court should consider his young age when analyzing the purpose of a "reasonable person" with his physical traits. Taking his youth into account, L.P. was simply answering "reflexively" (similar to what this Court said might occur for injured victims). As for the environment, the questioning occurred in a classroom full of students.

ARGUMENT

The Sixth Amendment's Confrontation Clause (incorporated against the States by the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 403 (1965)) gives a defendant "the right to be confronted with the witnesses against him" "[i]n all criminal prosecutions." U.S. Const. amend. VI. This right applies *only* to "'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (citation omitted). The clause thus regulates "*testimonial* statements of a witness who [does] not appear at trial." *Id.* at 53-54 (emphasis added). Conversely, it does not regulate *non-testimonial* statements made in something other than a "witness" capacity; the witness limit is "so clearly reflected in the [clause's] text" that the limit "must fairly be said to mark out not merely its 'core,' but its perimeter" as well. *Davis v. Washington*, 547 U.S. 813, 824 (2006).

L.P.'s statements to his teachers were non-testimonial. The Confrontation Clause's text, purpose, and history show that hearsay rules, not confrontation rights, govern the admissibility of a young child's statements to private parties. *See* Part I. Further, Ohio's mandatory-reporting statute does not turn teachers into police "agents." *See* Part II. Finally, even if it did, L.P.'s statements are non-testimonial under the primary-purpose test applicable to the police. *See* Part III.

I. A Young Child's Statements To Individuals Who Are Not Police Agents Are Not Testimonial Under The Confrontation Clause

The Court has reserved "whether and when statements made to someone other than law en-

forcement personnel are 'testimonial.'" *Davis*, 547 U.S. at 823 n.2; *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 n.3 (2011). This case squarely presents that question: L.P. identified Clark to his *teachers*. JA25-26, 59. The Court should now hold that the Confrontation Clause does not apply to statements meant for private parties without any police direction. At the least, it should reach that holding for statements from a child found too young to testify. Instead, evidence rules and due-process restraints regulate those types of statements.

A. Statements Made Solely To Private Parties Without Police Involvement Are Non-Testimonial

Setting aside potential exceptions not implicated here, *see* Part II.B, the Court should hold that statements made between private parties without police involvement are non-testimonial. That view comports with (1) the Confrontation Clause's *textual* focus on "witnesses"; (2) the clause's *purpose* to prevent distinct government abuses; and (3) this Nation's *history* of regulating private-party hearsay under evidentiary, not constitutional, rules.

1. Statements made solely to private parties are not "witness" testimony

a. To qualify as "witness" testimony, a statement must be a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford*, 541 U.S. at 51 (quoting 2 Noah Webster, *An American Dictionary of the English Language* (1828)); 1 Giles Jacob, *The Law-Dictionary: Explaining the Rise, Progress, and Present State of the English Law* (10th ed. 1797) (defining witness as "[o]ne who gives evidence in a cause"; defining "evidence"

as "[p]roof by testimony of witnesses, on oath" and other "proofs to be given and produced to a jury for the finding of any issue joined between the parties"). Under this definition, "testimonial" statements must meet two requirements.

First, testimonial statements must be solemn and formal, not casual or spontaneous. The Court has rejected a strict reading of this requirement that would "render inadmissible only sworn *ex parte* affidavits, while leaving admission of formal, but unsworn statements perfectly OK.'" *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011) (citation omitted). And while Justices disagree over the types of *unsworn* statements that qualify as sufficiently "formal," *compare Williams v. Illinois*, 132 S. Ct. 2221, 2260-61 (2012) (Thomas, J., concurring in the judgment), *with id.* at 2276-77 (Kagan, J., dissenting), *all* agree that statements must cross a formality threshold. As *Davis* said, "formality is indeed essential to testimonial utterance." 547 U.S. at 830 n.5.

Second, testimonial statements must be "for the purpose of establishing or proving some fact at trial," not for a social, business, or other purpose. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). Disagreement exists over this factor, too, with some requiring even a narrower purpose to accuse a specific target. *Williams*, 132 S. Ct. at 2242 (plurality op.). But all agree that statements must at least be made "for the purpose of providing evidence." *Id.* at 2273-74 (Kagan, J., dissenting). The statements must, when considered *objectively*, have "a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155; *id.* at 1156 & n.7.

b. The Court's cases applying these requirements have filled in the details about when three categories

of statements—prior testimony, statements to police, and trial records—qualify as testimonial.

Prior Testimony. All prior court testimony—whether "at a preliminary hearing, before a grand jury, or at a former trial"—satisfies both requirements. *Crawford*, 541 U.S. at 68. Indeed, most of this Court's cases consider that testimony, which sits at the clause's core. *Id.* at 57-58. That testimony is generally admissible only if the defendant had a prior opportunity to cross-examine an unavailable witness, *Mattox v. United States*, 156 U.S. 237, 240-44 (1895), or if the defendant kept the witness away, *Reynolds v. United States*, 98 U.S. 145, 158-59 (1878). The testimony is inadmissible, by contrast, if the witness was not shown to be unavailable, *Motes v. United States*, 178 U.S. 458, 470-75 (1900), or the defendant lacked an adequate cross-examination opportunity, *Pointer*, 380 U.S. at 406-08.

Statements to Police. More complex standards govern statements to police. On the one hand, a seemingly bright-line rule applies to a subset of those statements: Statements made during formal custodial interrogation at the stationhouse are testimonial. *Crawford*, 541 U.S. at 52-53, 68. Most of this Court's police cases involved interrogations of this sort, which resulted in formal confessions. *See Davis*, 547 U.S. at 837 n.2 (Thomas, J., dissenting). On the other hand, a totality-of-the-circumstances test applies to less formal statements to police in the field. *Bryant*, 131 S. Ct. at 1162. Those statements can have sufficient formality because of the "severe consequences that can attend a deliberate falsehood" to police. *Davis*, 547 U.S. at 826; *id.* at 830 n.5 ("It imports sufficient formality, in our view, that lies to such officers are criminal offenses."). The key ques-

tion boils down to the interrogation's purpose. If a declarant speaks to police for a reason other than "creating an out-of-court substitute for trial testimony" (such as seeking help), the statements are non-testimonial. *Bryant*, 131 S. Ct. at 1155.

Records for Trial. The same elements apply to an analyst's statements describing test results. *Melendez-Diaz*, 557 U.S. at 309-11. Those statements must serve an "evidentiary purpose"—such as a "certificate" created to prove that a substance found on the defendant was cocaine, *id.* at 310, or a "report" created to prove the defendant's blood-alcohol level, *Bullcoming*, 131 S. Ct. at 2711, 2716-17. And the statements must be sufficiently "formal"—such as a sworn affidavit, *Melendez-Diaz*, 557 U.S. at 310, or a report "'formalized' in a signed document," *Bullcoming*, 131 S. Ct. at 2717 (citation omitted).

c. This case calls for a bright (albeit narrow) *rule* like the one for prior testimony and custodial confessions, not a fact-specific *standard* like the one for field interrogations. The Court chose the former because prior testimony and formal interrogations are testimony "under any definition." *Crawford*, 541 U.S. at 52. It chose the latter because police questioning in the field straddles the murky border between testimonial and non-testimonial and so requires a fact-specific test. *Bryant*, 131 S. Ct. at 1162.

Statements like L.P.'s that (when objectively considered) are meant solely for a private party are the antithesis of prior testimony or custodial questioning. People do not "bear testimony" when they speak with their relatives, neighbors, coworkers, or, in this case, teachers. Thus, subject to potential exceptions this case does not implicate, *see* Part II.B, the Court should hold that statements objectively meant solely

for private parties are non-testimonial because they lack sufficient formality or an evidentiary purpose—and usually both. *Cf. Virginia v. Moore*, 553 U.S. 164, 175 (2008) (noting "'essential interest in readily administrable rules'" for Fourth Amendment (citation omitted)); *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) (same for Fifth Amendment).

The Court's cases justify this rule. *Crawford* recognized that "[a]n accuser who makes a formal statement to *government officers* bears testimony in a sense that a person who makes a casual remark to an *acquaintance* does not." 541 U.S. at 51 (emphasis added). Indeed, it is the "[i]nvolvement of government officers in the production of testimony with an eye toward trial [that] presents unique potential for prosecutorial abuse." *Id.* at 56 n.7. This logic applies to many factual settings.

The Court, for example, has twice suggested that statements between acquaintances are non-testimonial. When a witness asks "what happened?" on seeing a bruised friend, the friend's response "my husband hit me" is not testimony. *See Giles v. California*, 554 U.S. 353, 376 (2008). Those statements, objectively considered, are neither formal nor for trial. Instead, statements "to friends and neighbors about abuse" are regulated "by hearsay rules." *Id.*

Prison talk falls under the same rubric. During the trial in *Dutton v. Evans*, 400 U.S. 74 (1970), a prisoner testified about his conversation with the defendant's accomplice while the two walked in the prison yard. *Id.* at 76-77 (plurality op.). On the accomplice's return from an arraignment, the testifying prisoner asked: "'How did you make out in court?'" *Id.* The accomplice's response: "'If it hadn't been for that dirty son-of-a-bitch Alex Evans [the defendant],

we wouldn't be in this now.'" *Id.* *Dutton* held that the admission of this accusation did not violate the Confrontation Clause. *Id.* at 80-90. That was because, *Davis* clarified, the prisoners' conversation was "clearly nontestimonial." 547 U.S. at 825.

The Court has made the same point for private statements falling within hearsay exceptions. Statements introduced under the co-conspiracy exception (which admits a coconspirator's statements furthering a conspiracy) do "not pertain to a constitutional right." *Giles*, 554 U.S. at 374 n.6 (citing *Bourjaily v. United States*, 483 U.S. 171 (1987)). *Bourjaily* allowed the use of an informant's recorded conversation with the defendant's accomplice. 483 U.S. at 173-74, 182-84. This admission did not violate the Confrontation Clause because the accomplice's statement was "not (as an incriminating statement in furtherance of the conspiracy would probably never be) testimonial." *Giles*, 554 U.S. at 374 n.6; *Wiborg v. United States*, 163 U.S. 632, 657-58 (1896).

Or consider business records. They are "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." *Melendez-Diaz*, 557 U.S. at 324. The Court thus allowed the use of "bank deposit slips and book entries" even though recorded by individuals "not produced as witnesses." *Salinger v. United States*, 272 U.S. 542, 547 (1926).

Similarly, a patient's statements to doctors in the course of treatment are non-testimonial. *Giles*, 554 U.S. at 376. So are "medical reports created for treatment purposes." *Melendez-Diaz*, 557 U.S. at 312 n.2. In both situations, the declarant makes the statements for health reasons.

L.P.'s statements to his daycare teachers fit this mold. The statements were made in a classroom, not a courtroom, to educators, not investigators. JA26, 44. Unlike with statements to police, no formality can be premised on the notion that lies to the teachers were crimes. *Davis*, 547 U.S. at 826. And L.P.'s statements had as much of an "evidentiary" purpose as an adult's "[s]tatements to friends and neighbors about abuse." *Giles*, 554 U.S. at 376. Both may recount events, but neither is "an obvious substitute for live testimony." *Davis*, 547 U.S. at 830.

Indeed, *Crawford*'s discussion of *White v. Illinois*, 502 U.S. 346 (1992), reinforces this distinction between statements to *private actors* and statements to *police* in the most analogous setting. In *White*, a child told her babysitter that the defendant had abused her moments after the abuse. *Id.* at 349. The child's mother "question[ed] her daughter about what had happened." *Id.* The mother called the police, who again questioned the child. *Id.* Finally, a nurse and physician examined her. *Id.* at 350. The child "provided an account of events that was essentially identical." *Id.* With the child emotionally unable to testify, the trial court admitted her statements under the spontaneous-declaration and medical-examination hearsay exceptions. *Id.* at 350-51. *White* held that evidence falling within those exceptions satisfied the Confrontation Clause regardless of the child's availability. *Id.* at 356-57.

Crawford called *White* into doubt, but the way it did so is revealing. It criticized *White* regarding the statements to the "police officer." 541 U.S. at 58 n.8. *Crawford* hinted that the statements *to police* might have been testimonial there, noting that *White* did not ask "whether *certain* of the statements" that the

child made could be used even if they were testimonial. *Id.* (emphasis added). *Crawford*, by contrast, did *not* question the admission of the child's statements to her babysitter, mother, nurse, or doctor. Those statements, like L.P.'s, were non-testimonial.

2. Statements made solely to private parties do not mirror the official abuses resulting in the Confrontation Clause

a. Statements made solely to private parties fall outside the Confrontation Clause's *purpose*. In 16th-century England, justices of the peace used civil-law methods of criminal procedure. Officials questioned witnesses in preliminary hearings; the prosecution used records of the interrogations at trial. *Crawford*, 541 U.S. at 43 (citing 1 James F. Stephen, *History of the Criminal Law of England* 326 (1883)). Often "the main part of the case for the prosecution was contained in the depositions under oath of witnesses." 9 William S. Holdsworth, *A History of English Law* 218 (1926). Walter Raleigh's treason trial was the "most notorious" example. *Crawford*, 547 U.S. at 44.

To guard against trial by *state-generated* affidavit, English courts developed a common-law right prohibiting the use of written preliminary-hearing testimony unless the defendant had a cross-examination opportunity. *Id.* at 44-46 (citing *King v. Paine*, 87 Eng. Rep. 584, 585 (1696)). Thus, Blackstone "presented the confrontation right as designed to avoid the unfairness of *government-prepared* depositions." Akil R. Amar, *The Constitution & Criminal Procedure* 130 (Yale Univ. Press 1997) (emphasis added). "[O]pen examination of witnesses," he said, "is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer or his clerk." 3 William

Blackstone, *Commentaries on the Laws of England* 373 (1768). An evidence treatise made the same point: "[T]he Examiners and Commissioners in such Cases do often dress up secret Examinations, and set up a quite different Air upon them from they would seem if the same Testimony had been plainly delivered under the strict and open Examination of the Judge at the Assizes." 1 Geoffrey Gilbert, *The Law of Evidence* 60 (2d ed. 1756).

The Framers "were keenly familiar" with this practice. *Crawford*, 541 U.S. at 56 n.7. They did not just decry taxation without representation; they decried the "means of enforcing the new taxes." David S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764-1776*, 16 W. & Mary Q. 459, 460 (1959). "Parliament directed that the new tax laws could be enforced in either the regular colony courts where common-law procedures operated or in the *courts of admiralty* which proceeded without juries *according to the civil law*." *Id.* at 461 (emphases added). "[T]estimony by depositions was commonplace" in those admiralty courts. Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 397 (1959). This led to unflagging protests against their methods. *See* 30 Charles A. Wright et al., *Federal Practice & Procedure* § 6345, at 525 (1997); 1 Journals of the Continental Congress 1774-1789, at 71 (Worthington C. Ford ed. 1904) (criticizing extension of "admiralty courts beyond their ancient limits").

The Framers remedied this evil (the government's trying the case before the trial) with the Confrontation Clause and its state analogs. Those provisions constitutionally enshrined the common-law right against the civil-law procedure. *See Salinger*, 272

U.S. at 548; 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1785, at 662 (1833). Thus, the Confrontation Clause's "primary object was to prevent depositions or ex parte affidavits being used against the prisoner in lieu of a personal examination and cross-examination of the witness." *Mattox*, 156 U.S. at 242.

b. This purpose (to prevent the "use of *ex parte* examinations") has guided the Court's reading of the Confrontation Clause. *Crawford*, 541 U.S. at 50. The Court has applied the purpose in two factual settings—those existing when the Confrontation Clause was enacted and those arising later.

For the former, the Court has rejected efforts to "attribute[] to the right a much broader scope than it had at common law." *Salinger*, 272 U.S. at 548; *Mattox*, 156 U.S. at 243. Because, for example, the right never prohibited the use of prior testimony when the defendant had an opportunity to cross examine an unavailable witness, *Mattox*, 156 U.S. at 242, the Court incorporated this limit on the right into the Constitution, *Crawford*, 541 U.S. at 59.

For the latter, the Court has inferred how the Framers would have applied the right in the new setting. Most notably, *Crawford* and *Davis* asked how the right should apply to police questioning, a new development because "England did not have a professional police force until the 19th century." *Crawford*, 541 U.S. at 53. Those cases extended the clause to police because—while "we no longer have examining Marian magistrates"—today's "examining police officers" undertake the "investigative and testimonial functions once performed by" the earlier investigators. *Davis*, 547 U.S. at 830 n.5. Police interrogations designed to generate evidence for trial serve

the same purposes (and are subject to the same abuses) as magistrate interrogations bemoaned by the Framers. "The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace." *Crawford*, 541 U.S. at 53.

c. The Confrontation Clause's purpose confirms that L.P.'s statements (like all statements meant solely for private parties) fall outside the right. It would be a stretch to characterize the use of those statements as a "modern-day practice[] that [is] tantamount to the abuses that gave rise to the" right. *Williams*, 132 S. Ct. at 2242 (plurality op.). Those statements, by definition, are not made to *criminal investigators* like police officers or justices of the peace. They are meant *solely* for private parties. And they objectively lack a purpose to create a substitute for the criminal trial. Their use at trial is thus not analogous to "government-prepared depositions." Amar, *Criminal Procedure*, at 130. To hold that the clause regulates these statements would "attribute[] to the right a much broader scope than it had at common law." *Salinger*, 272 U.S. at 548.

Nor do private-party statements require the Court to infer how the Framers would have applied the right in a new setting. Private conversations existed just as much in the 18th century as they do today. Yet Ohio is unaware of early cases extending the clause to those statements. "Most of the American cases applying the Confrontation Clause or its state constitutional or common-law counterparts involved testimonial statements of the most formal sort—sworn testimony in prior judicial proceedings or formal depositions under oath " *Davis*, 547 U.S. at 825-26; *cf. Anthony v. State*, 19 Tenn. 265,

1838 WL 1124, at *8 (1838) (noting "after more than forty years from the adoption of our first Constitution [an] argument against the admissibility of dying declarations on the ground of the Bill of Rights is for the first time made"). Instead, as shown below, courts regulated purely private statements under *evidentiary*, not *constitutional*, standards.

3. Courts historically regulated statements made solely to private parties under evolving hearsay, not rigid confrontation, rules

The judiciary's traditional manner of regulating statements solely between private parties confirms that they do "not pertain to a constitutional right." *Giles*, 554 U.S. at 374 n.6. Courts historically analyzed the statements under *general* hearsay rules, and gradually *expanded* use of the statements under growing exceptions. Both facts conflict with any notion that the Confrontation Clause provided special rules for those statements solely in criminal cases.

a. Courts did not historically equate private-party hearsay with the "*ex parte* examinations" at the Confrontation Clause's core. *Crawford*, 541 U.S. at 51. They regulated the former under evidentiary *hearsay* rules (applicable in civil and criminal cases); they regulated the latter under constitutional *confrontation* rules (applicable in criminal cases). *Equal* treatment of private-party hearsay in civil and criminal cases conflicts with any notion that the Confrontation Clause triggered *special* criminal rules for that private-party hearsay.

In England, "[t]he common-law rule [of confrontation] had been settled since *Paine* in 1696." *Crawford*, 541 U.S. at 54 n.5. Yet "[a]n emerging consen-

sus dates the hearsay rule—as a genuine rule, honored more in the observance than in the breach—to the late eighteenth century and early nineteenth century." David A. Sklansky, *Hearsay's Last Hurrah*, 2009 Sup. Ct. Rev. 1, 26 (2009); John H. Langbein, *The Origins of Adversary Criminal Trial* 238-39 (2003). While early treatises recite the rule against hearsay, 1 Gilbert, *Evidence*, at 152, private-party hearsay remained common in 18th-century trials. Criminal cases in the Old Bailey court used hearsay "with very little restraint." Stephen Landsman, *Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 Cornell L. Rev. 497, 567 (1990). Even by 1755, "[w]itnesses continued to recite what they had learned from 'a man' or 'somebody.'" T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 Iowa L. Rev. 499, 514 (1999); *Trial of George Lord Gordon*, 21 How. St. Tr. 485, 514-15 (1781) (admitting mob's statements). If the confrontation right was understood as reaching private-party hearsay, courts would not have admitted it so cavalierly. *Cf.* 2 William Hawkins, *A Treatise of the Pleas of the Crown* 429-31 (4th ed. 1762) (identifying ban on prior depositions and ban on hearsay in *different* sections).

Crossing the Atlantic, "one important generalization can be established" from some colonial courts—"that in general a good deal of testimony which would today be excluded as hearsay was regarded as admissible in the eighteenth century." Julius Goebel Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)* 642 (1944); *cf. id.* at 641 (noting that preliminary-examination testimony was "only exceptionally a part of the case"). Post-ratification courts likewise evaluated private conversations under hear-

say law *equally* applicable in civil and criminal cases. As *Crawford* noted, 541 U.S. at 59 n.9, Chief Justice Marshall prohibited a witness from recounting a private conversation during Aaron Burr's treason trial because the hearsay rule "excludes" such declarations "from trials of a criminal or civil nature." *United States v. Burr*, 25 F. Cas. 187, 193 (C.C. Va. 1807); *cf. Queen v. Hepburn*, 11 U.S. 290, 295-96 (1813). This Court later *admitted* co-conspirator statements falling under the "res gesta" or "thing done" hearsay exception. *United States v. Gooding*, 25 U.S. 460, 469-70 (1827). It refused to confine this exception to civil cases because "[i]n general the rules of evidence in criminal and civil cases are the same." *Id.* at 469.

Early state cases made the same point. *Cornwell v. State*, 8 Tenn. 147, 151 (1827) (admitting co-conspirator statement, as "it is immaterial whether they be civil or criminal cases"); *State v. Rawls*, 11 S.C.L. 331, 333 (S.C. Const. Ct. App. 1820) (applying refreshed-recollection rule, as "it is now very well settled, that the rules of evidence are the same in criminal, as in civil, cases."). By 1880, one commentator called it "late in the day" to distinguish "between civil cases and criminal cases as to the admission of declarations as a part of the *res gesta*," finding that confrontation rights did *not* affect this rule. James B. Thayer, *Bedingfield's Case: Declarations as a Part of the Res Gesta*, 14 Am. L. Rev. 817, 828-29 (1880); *see* Henry Roscoe, *Digest of the Law of Evidence in Criminal Cases* 1, 22 (2d ed. 1840).

b. Equally noteworthy, courts steadily expanded the *exceptions* to the hearsay ban for private-party hearsay, an expansion that would have sputtered at the outset if the Confrontation Clause (and its state

counterparts) rigidly constitutionalized 18th-century hearsay law for private-party statements.

The excited-utterance exception provides the best example. "[I]t is questionable whether testimonial statements would ever have been admissible on that ground in 1791." *Crawford*, 541 U.S. at 58 n.8. A declarant would have needed to make the statement near simultaneously with the event described. *Id.* And "it [was] only within later generations that [the exception was] firmly and unquestionably established." 6 John H. Wigmore, *Evidence* § 1747, at 195 (J. Chadbourn rev. 1974).

Thus, if a victim's after-the-fact *identification* of the culprit to *private actors* qualifies as testimonial, courts have been violating the confrontation right for quite some time. In *Hill v. Commonwealth*, 2 Gratt. 594 (Va. 1845), for example, the victim was stabbed, stumbled back to a tavern, and passed out. *Id.* at 600-01. Reawakening, he "'put his hand to his left breast, and said here it is, here it is'—'[the defendant] asked me to walk out, and stabbed me here.'" *Id.* The court admitted these statements without constitutional concern. *Id.* Similarly, in *Commonwealth v. M'Pike*, 57 Mass. 181 (1849), the victim asked a witness to find help and later told him that the defendant stabbed her. *Id.* at 182. The court affirmed the use of these statements, saying that, "[i]n the admission of testimony of this character, much must be left to the exercise of the sound discretion of the presiding judge." *Id.* at 184. Or consider *Rex v. Foster*, 172 Eng. Rep. 1261 (1834), where the court admitted a victim's statements to a "waggoner" after a carriage ran him over. *Id.* at 1261. "It [was] the best possible testimony that, under the circumstanc-

es, can be adduced to shew what it was that had knocked the deceased down." *Id.*

Cases like these were routine by the late 19th century. *See Croomes v. State*, 51 S.W. 924, 924-25 (Tex. Crim. App. 1899); *State v. Murphy*, 17 A. 998, 999 (R.I. 1889); *People v. Vernon*, 35 Cal. 49, 50-51 (1868); *Von Pollnitz v. State*, 18 S.E. 301, 301 (Ga. 1893); *People v. Callaghan*, 6 P. 49, 54-55 (Utah 1885); *People v. Simpson*, 12 N.W. 662, 664 (Mich. 1882). By the early 20th century, a victim's identification to a private party was used "[i]n most of the states." *People v. Del Vermo*, 85 N.E. 690, 695 (N.Y. 1908). Courts could cite "cases almost without limit." *Solice v. State*, 193 P. 19, 22 (Ariz. 1920). To be sure, some States applied stricter rules than others. *See State v. Estoup*, 1 So. 448, 449 (La. 1887); *Jones v. State*, 71 Ind. 66, 81-83 (1880). But these cases, too, regulated the statements under *evidentiary* rules. *Jones*, 71 Ind. at 81-83. Most cases (early or late) did not suggest that private-party hearsay raised constitutional concerns, notwithstanding the state confrontation rights. *See* 5 Wigmore § 1397, at 155-58 n.1.

In sum, the historical treatment of statements between private parties confirms what the Confrontation Clause's text and purpose show. While those statements raise *evidentiary* concerns, they do not raise *constitutional* ones. If, as Professor Thayer said, it was too "late in the day" to constitutionally regulate them back in the 1880s, *Bedingfield's Case*, 14 Am. L. Rev. at 829, it is too late to regulate them that way some 130 years later.

B. At The Least, Statements To Private Parties By Children Found Too Young To Testify Are Non-Testimonial

Logic and history show that, at the least, statements to private parties are non-testimonial if made by a child found too young to provide "testimony."

1. Statements to private parties from a child found too young to testify fall outside the Confrontation Clause's text ("witness" testimony) when the State's competency rules mirror the constitutional divide between testimonial and non-testimonial. Ohio children under ten are too young to testify if they "appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." Ohio R. Evid. 601(A). Courts must examine children to assess whether they can recount facts and comprehend the solemn nature of their testimony. *See State v. Maxwell*, 9 N.E.3d 930, 957-58 (Ohio 2014).

Out-of-court statements to private parties from young children who do not pass this test are not witness testimony. The competency finding confirms that those children are "simply unable to understand the legal system and the consequences of statements made during the legal process." *State v. Bobadilla*, 709 N.W.2d 243, 256 (Minn. 2006). In other words, "some very young children should be considered incapable of being witnesses for Confrontation Clause purposes." Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 Brook. L. Rev. 241, 272 (2005). If a child cannot be a "witness" *inside* the courtroom, it makes no sense to say the child can be a "witness" *outside* it.

2. A volume of history supports this page of logic. Incompetent children's statements to private parties were often introduced as the "best evidence" well after the confrontation right had been settled. In England, young children were incompetent. 1 Gilbert, *Evidence* at 146-47; *Rex v. Travers*, 93 Eng. Rep. 793, 794 (1726). Writing in the 17th century, Matthew Hale sought to change this rule by allowing children to be sworn if they "know[] and consider[] the obligation of an oath." 1 Matthew Hale, *The History of the Pleas of the Crown* 634 (E. Rider et al., 1800). Even if they could not be sworn, Hale asserted, the child should be heard unsworn on the ground that the child's unsworn statement was better than a relative's secondhand account. *Id.* Hale took it *as a given* that when a "child complains presently of the wrong done to her to the mother or other relations," "their evidence" (the hearsay) "shall be taken." *Id.*

Based on Hale's influence, 18th-century treatises "assumed that when children were too young to testify, and thus unavailable, their hearsay was admissible in child rape and assault prosecutions." Thomas D. Lyon and Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 Ind. L.J. 1029, 1038 (2007). In the first edition of his Commentaries, Blackstone suggested that the law "allow[ed] what the child told her mother, or other relations, to be given in evidence, since the nature of the case admits frequently of no better proof." 4 Blackstone, *Commentaries*, at 214; Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 293 (4th ed. London 1785).

This view is evident in 18th-century practice. When judges found children incompetent, they "were disposed to compensate by allowing the mother, a

surgeon, or others to whom the child had spoken contemporaneously upon the happening of the events to give an account of what the child had then said." Langbein, *Origins*, at 239-40. Child hearsay was thus common "from 1684 to 1789." Lyon, 82 Ind. L.J. at 1039-45 (citing cases). In a stolen-handkerchief case, for example, the aggrieved owner testified that a man told him that his servant had found the stolen item "in Black-and-white-court," and that the servant could not testify because she was "a child of about 12 or 13 years of age, and not of years sufficient to give testimony." *Rex v. Reddy*, Old Bailey Session Papers No. 302-03, at 271 (Sept. 1755). In a rape case, a mother detailed her child's statements about the rape. *Trial of Charles Ketteridge*, Old Bailey Session Papers, No. 394, at 427-28 (Sept. 1779).

3. *King v. Brasier*, 168 Eng. Rep. 202 (1779)—a child-rape case cited by this Court—comports with this history when understood as a *competency*, not a *hearsay*, case. Various accounts exist of the evidence in the case. Earlier reporters from the 18th-century suggest the victim testified unsworn (consistent with Hale's idea). *See* Thomas Leach, *Cases in Crown Law* 200 (1st ed. 1789); Anthony J. Franze, *The Confrontation Clause and Originalism: Lessons from* King v. Brasier, 15 J.L. & Pol'y 495, 527-41 (2007). Later 19th-century reporters (like the 1815 reporter copied into the English Reports) state that the child's mother and another testified about her statements after the rape and on the next day when she identified Brasier. 1 Edward H. East, *A Treatise of the Pleas of the Crown* 443 (Philadelphia 1806); *Brasier*, 168 Eng. Rep. at 202. Brasier was convicted; a 12-judge panel reversed. East, *Pleas*, at 444.

As a matter of *competency*, *Brasier* unambiguously accepted one Hale idea and unambiguously rejected another. The panel "unanimously agreed" with Hale "that a child of any age if, if she were capable of distinguishing between good and evil, might be examined on oath." *Id.* But it rejected Hale's view that an incompetent child could testify *unsworn*, finding "that a child of whatever age cannot be examined unless sworn." *Id.* Thus, *Brasier* "principally was understood in England and the states as resolving child competency issues." Franze, 15 J.L. & Pol'y at 534-35; *see, e.g.*, *McGuff v. State*, 7 So. 35, 37 (Ala. 1889).

As a matter of *hearsay*, *Brasier* is an enigma. Some reporters suggest the testimony about "the information which the infant had given to her mother and the other witness, ought not to have been received." 168 Eng. Rep. at 203. But *Brasier* likely adopted a "best evidence" rule: that the child should testify and the hearsay found inadmissible when the child is *competent* (saying nothing about *unavailable* children's hearsay). *See Commonwealth v. Bardino*, 3 Berks 350, 1911 WL 3681, at *5 (Pa. O & T 1911). Indeed, the 1815 reporter elsewhere suggested that the child "was held a good witness by all the Judges." *Travers*, 93 Eng. Rep. at 794 n.1. English cases *after Brasier*, moreover, continued to admit *incompetent* children's hearsay (one by a judge who sat on *Brasier*). Lyon, 82 Ind. L.J. at 1044-45. Regardless, even assuming *Brasier* established broader *evidentiary* hearsay principles, *cf. id.* at 1053 (citing later edition of Blackstone reading *Brasier* more broadly), it does not establish broader *constitutional* confrontation principles. The judges debated whether the statements to the mother were part of the "fact or transaction" under the res gesta exception. East, *Pleas*, at

444. Our fundamental charter did not constitutionalize the fine subtleties of that hearsay exception.

C. Treating Private-Party Statements As A Hearsay Matter Promotes The Development Of Sound Evidentiary Rules

While a non-testimonial finding for an incompetent child's statement to private parties ends the matter as far as the *Confrontation Clause* is concerned, it does not end the matter as far as the *criminal trial* is concerned. "Of course the Confrontation Clause is not the only bar to admissibility of hearsay statements." *Bryant*, 131 S. Ct. at 1162 n.13. Other rules regulate the use of the child's statements. Courts may admit the statements only if they survive two "reliability" tests.

As an initial matter, the statements must satisfy an exception to the evidentiary hearsay ban. Ohio R. Evid. 802. A statement must fall within either a categorical exception for statements historically deemed reliable or a residual exception asking whether the relevant statements contain "particularized guarantees of trustworthiness." Ohio R. Evid. 807(A)(1). Ohio's reading of the Confrontation Clause thus does not open the floodgates to trial by hearsay. Hearsay still must be reliable. After all, it is "[t]he rules of evidence, not the Confrontation Clause, [that] are designed primarily to police reliability." *Bullcoming*, 131 S. Ct. at 2720 n.1 (Sotomayor, J., concurring).

Notably, moreover, leaving private-party hearsay to evidence rules has modern benefits. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." *Crawford*, 541 U.S. at 68. Legislatures and courts can adapt

their evidence rules to new statistics and new insights regarding the wisdom of hearsay exceptions.

That is no small benefit. "From Bentham to the authors of the Uniform Rules of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom." Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434, 1436 (1966). The benefit is especially critical in cases like this one. "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

Finally, state and federal hearsay rules are backed by a broad due-process check. *Bryant*, 131 S. Ct. at 1162 n.13. Gross misuse of unreliable hearsay could violate the Due Process Clause if it is "'so extremely unfair that its admission violates fundamental conceptions of justice.'" *Perry v. New Hampshire*, 132 S. Ct. 716, 724 (2012) (citation omitted).

In sum, "[t]here is no reason to strain the text of the Confrontation Clause" based on reliability concerns. *White*, 502 U.S. at 364 (Thomas, J., concurring in the judgment). Evidence and due-process rules already "provide criminal defendants with [such a reliability] protection." *Id.*

II. The Ohio Supreme Court Mistakenly Held That A Mandatory-Reporting Duty Turned Daycare Teachers Into Police Agents

Perhaps recognizing that statements between private parties fall outside the Confrontation Clause, the Ohio Supreme Court made this case about police. Pet. App. 6a-9a. It erred in holding that Ohio's mandatory-reporting statute transformed statements to

teachers into statements to police. Further, no other facts suggest that the teachers were police "agents."

A. The Confrontation Clause Does Not Treat Mandatory Reporters As Police Agents

In Ohio, as in all States, teachers and medical professionals (among others) must "immediately report" child-abuse suspicions to a "public children services agency or a municipal or county peace officer" when they "know[], or ha[ve] reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child." Ohio Rev. Code § 2151.421(A)(1)(a); Pet. 23-24 (citing statutes). If reporters make these reports, they are immune from suit for injuries arising from the reports. Ohio Rev. Code § 2151.421(G)(1)(a). If they fail to make the reports, a child may sue for any damages suffered, *id.* § 2151.421(M), and the reporters can be criminally punished, *id.* § 2151.99(C).

Specific Confrontation Clause principles and general constitutional principles show that the clause does not require courts to treat statements to mandatory reporters like statements to police.

1. Confrontation Clause principles illustrate that mandatory reporters are not police agents

Two Confrontation Clause principles—one focused on the mandatory-reporting listener, the other on the child declarant—prove that the Court should

not treat statements to mandatory reporters as if they were statements to police.

a. *The Listener*. Mandatory reporters are a more recent phenomenon than police forces; statutes date only to the 1960s. 130 Ohio Laws 625-26, 1819 (1963) (Am. H.B. 765); Monrad G. Paulsen, *The Legal Framework for Child Protection*, 66 Columbia L. Rev. 679, 710-13 (1966). But both historical reporting duties and the nature of the present one show that reporters should not be deemed police agents.

"Historically, the common law recognized" a general "duty to raise the 'hue and cry' and report felonies to the authorities." *Branzburg v. Hayes*, 408 U.S. 665, 696 & nn.34-35 (1972). A "misprision of felony" occurred when "'anyone learn[ed] or [knew] that another ha[d] committed treason or felony, and he d[id] not choose to denounce him to the King or to his Council, or to any magistrate, but conceal[ed] his offense.'" *United States v. Caraballo-Rodriguez*, 480 F.3d 62, 71 (1st Cir. 2007) (quoting *Sykes v. Dir. Pub. Prosecutions*, [1962] A.C. 528, 555 (H.L.) (U.K.)). According to Blackstone, statutes treated this failure to report *differently* if committed by a "public officer" or a "common person," 4 Blackstone, *Commentaries*, at 121, illustrating that common people with reporting duties were not viewed as public officers. *See Caraballo-Rodriquez*, 480 F.3d at 75-76. And while "the term 'misprision of felony' now has an archaic ring, gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship." *Roberts v. United States*, 445 U.S. 552, 558 (1980). If Ohio's reporters are police agents, this traditional duty deputized the entire populace.

Turning to today's duty, *Crawford*'s method for analyzing a modern phenomenon (the police) illus-

trates that mandatory reporters are not their equivalent. 541 U.S. at 52-53. As noted, police interrogations are testimonial because of their similarity to civil-law interrogations by justices of the peace—who "performed the investigative functions now associated primarily with the police." *Id.* at 53. Mandatory reporters, by contrast, are not 21st-century justices of the peace. The statute merely requires them to *report* suspicions arising from their normal job activities. Doctors must report abuse they uncover from examining patients; teachers must report abuse they uncover from teaching students. Ohio courts have rejected "reliance on [the statute] for the creation of a duty to investigate." *Fishpaw v. Francisco*, No. 05AP-861, 2006 WL 1825976, at *6 (Ohio Ct. App. June 30, 2006). Accordingly, treating a mandatory reporter as a police agent is analogous to treating a neighbor who *calls* 911 as a police agent (rather than the operator who *answers* the call).

Yet a law-enforcement nexus is even one step removed from the neighbor's 911 call. Mandatory reporters need not (and the daycare teachers here did not) call *police*. A "reporter under the statute has the option to report suspected abuse to either the public children services agency or law enforcement." *O'Toole v. Denihan*, 889 N.E.2d 505, 513 (Ohio 2008). To be sure, social workers conduct their investigation "in cooperation with law enforcement" and issue a "report of [the] investigation, in writing, to" law enforcement. Ohio Rev. Code § 2151.421(F)(1). But social workers are not themselves law enforcement; they have neither a "duty to enforce laws" nor a power "to arrest violators." *State v. Dobies*, No. 91-L-123, 1992 WL 387356, at *3 (Ohio Ct. App. Dec. 18, 1992).

So the statute does not even require reporters to directly invoke the State's criminal apparatus.

This decision was intentional. Ohio's mandatory-reporting statute arose from a *protective*, not a *prosecutorial*, purpose. "[T]he primary purpose of reporting is to facilitate the protection of abused and neglected children." *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861, 871 (Ohio 2004). The statute thus directs *social workers*—not *police officers*—to investigate reports within 24 hours. Ohio Rev. Code § 2151.421(F)(1). That is true even when the reporter calls the police; the police must refer the report to a social worker. *Id.* § 2151.421(D)(1). Reliance on social workers was suggested by model-legislation drafters, Paulsen, 66 Columbia L. Rev. at 713-14, to "emphasize[] the rehabilitative and treatment aspects of the process" rather than the punitive aspects, Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 Vill. L. Rev. 458, 491 (1978).

In sum, Ohio places on mandatory reporters neither a duty to investigate crime nor a duty to cooperate with those who do. They are not police agents.

b. *The Declarant.* Ultimately, moreover, what matters is the intent of the *child declarant* who makes a statement, not the intent of the *mandatory reporter* who listens to it. *Bryant*, 131 S. Ct. at 1162. Even when a listener (such as an FBI informant) initiates a conversation for a secret police purpose, courts must ignore that purpose if the declarant does not know about it. *Bourjaily*, 483 U.S. at 181-84. In other words, "statements made unwittingly to a Government informant" do not become testimonial merely because of the listener's hidden prosecutorial motives. *Davis*, 547 U.S. at 826.

By analogy, even if mandatory reporters *subjectively* ask questions with the reporting obligation in mind, it is *objectively* unlikely (to say the least) that small children speaking to the reporters will know about this duty, let alone equate their teachers with police. That is true even if the children have some vague understanding of what police do. *Cf.* Alexia Cooper et al., *Maltreated and Nonmaltreated Children's Knowledge of the Juvenile Dependency Court System*, 15 Child Maltreatment 255, 258 (2010).

2. Other constitutional provisions confirm that mandatory reporters are not police agents

Another way to think about the problem—an analogy to sister constitutional rights—cements the conclusion that the Ohio Supreme Court erred in treating mandatory reporters as police agents.

Fourth Amendment. The Court has rejected the notion that private parties act as police agents under the Fourth Amendment when they conduct private searches. Rather, a defendant must show that the private party undertook the search with the police's endorsement. *Compare Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614-16 (1989), *with United States v. Jacobsen*, 466 U.S. 109, 113-15 (1984). Under this test, courts have rejected the argument that a statute requiring internet service providers to report child pornography turned them into police agents. The statute merely "clear[ed] the way for [providers] to *report* violations of the child pornography laws, not investigate them." *United States v. Richardson*, 607 F.3d 357, 367 (4th Cir. 2010); *United States v. Stevenson*, 727 F.3d 826, 830 (8th Cir. 2013) ("A reporting requirement, standing alone, does not transform an Internet service provider into

a government agent whenever it chooses to scan files sent on its network for child pornography."). If a statutory reporting duty does not turn a private party's *search* into a police search under the Fourth Amendment, it is hard to see why such a duty turns the private party's *questions* into police questions under the Confrontation Clause. *Cf. United States v. Miller*, 425 U.S. 435, 443 (1976) (holding that bank's duty to maintain customer records did not turn the bank into government agent).

Nor, for that matter, would reporting duties raise Fourth Amendment red flags even if imposed on a state actor. Indeed, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), expressly distinguished reporting statutes from a state hospital's policy of drug testing pregnant women "*for the specific purpose of incriminating those patients*" (rather than for any medical purpose). *Id.* at 85. Unlike that policy, reporting statutes merely require personnel to "provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment." *Id.* at 84-85. They do *not* require personnel to "set out to obtain incriminating evidence from their patients for law enforcement purposes." *Id.* at 78 n.13; *id.* at 90 (Kennedy, J., concurring in the judgment) (noting that the holding did "not call into question the validity of mandatory reporting laws such as child abuse laws which require teachers to report evidence of child abuse").

Fifth Amendment. The warnings required under *Miranda v. Arizona*, 384 U.S. 436 (1966), confirm that mandatory reporters are not police agents. Those warnings apply only to custodial interrogation due to that setting's coercive nature. *Illinois v. Perkins*, 496 U.S. 292, 296 (1990). The Court has thus

held that *Miranda* warnings are not required "whenever a suspect is in custody in a technical sense and converses with someone [such as an undercover officer] who happens to be a government agent." *Id.* at 297; 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.10(c), at 542 (3d ed.).

Under this framework, lower courts have repeatedly rejected the claim that a mandatory-reporting "statute transforms [a reporter] into a state agent so that any incriminating statements made to the [reporter] violate [a child abuser's] privilege against self-incrimination" unless the reporter provides *Miranda* warnings. *People v. Younghanz*, 202 Cal. Rptr. 907, 911 (Cal. Ct. App. 1984); *State v. Coonrod*, No. CA2009-08-013, 2010 WL 1019586, at *2-4 (Ohio Ct. App. Mar. 22, 2010); *Wilkerson v. State*, 173 S.W.3d 521, 528-29 (Tex. Crim. App. 2005); *State v. Sprouse*, 478 S.E.2d 871, 874-76 (S.C. Ct. App. 1996); *People v. Cavaiani*, 432 N.W.2d 409, 414 (Mich. Ct. App. 1988). If a conversation between a mandatory reporter and a child abuser lacks a police interrogation's inherent *coerciveness* to trigger *Miranda*, it should not be viewed as having a police interrogation's inherent *solemnity* to trigger *Crawford*.

Sixth Amendment. An analogy to the Sixth Amendment's right to counsel shows the same. The right to counsel bars the government from using a cooperating prisoner as a government agent to elicit jailhouse admissions from an indicted defendant. *United States v. Henry*, 447 U.S. 264, 270-75 (1980). Yet no Sixth Amendment problem arises if the "informant, either through prior arrangement or voluntarily," merely "report[s] [the defendant's] incriminating statements to the police." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986). Under this standard,

courts have rejected the notion that an informer qualifies as a "police agent" merely by acting on the "duty that is imposed upon all citizens to report criminal activity to the appropriate authorities." *Lightbourne v. Dugger*, 829 F.2d 1012, 1020 (11th Cir. 1987); *United States v. Birbal*, 113 F.3d 342, 344-46 (2d Cir. 1997) (informer not police agent merely because he agreed "to provide 'any and all information in his possession of which he has knowledge'"). Just as a statute requiring *anyone* to report crime would not turn all prisoners into police agents under the right to counsel, it also does not turn all prisoners (such as the prisoner in *Dutton*) into police agents under the right to confrontation.

Two final points remove all doubt. For one, courts have held that a duty to report child abuse does *not* transform private parties into state actors under 42 U.S.C. § 1983. While a reporting duty "goes somewhat beyond the cases dealing with the voluntary furnishing of information to the police the reporting requirement does not create the kind of regulatory nexus that could justify treating [a reporter] as a state actor." *Brown v. Newberger*, 291 F.3d 89, 93-94 (1st Cir. 2002); *Mueller v. Auker*, 700 F.3d 1180, 1191-92 (9th Cir. 2012). For another, the weight of authority holds "that mandatory reporters are not transformed into investigative agents of law enforcement upon hearing a declarant's hearsay statement because their reporting requirement, by itself, does not compel them to initiate the inquiry, investigate the statement, or ascertain its veracity for the purpose of possible criminal prosecution." *People v. Phillips*, 315 P.3d 136, 165 (Colo. Ct. App. 2012); *United States v. Squire*, 72 M.J. 285, 288-89 (C.A.A.F. 2013); *United States v. DeLeon*, 678 F.3d

317, 324-25 (4th Cir. 2012), *rev'd on other grounds by* 133 S. Ct. 2850 (2013); *Seely v. State*, 282 S.W.3d 778, 788-89 (Ark. 2008); *People v. Cage*, 155 P.3d 205 (Cal. 2007); *State v. Spencer*, 169 P.3d 384, 389 (Mont. 2007); *People v. Duhs*, 947 N.E.2d 617, 620 (N.Y. 2011); *State v. Bella*, 220 P.3d 128, 132-33 (Or. Ct. App. 2009).

B. No Other Basis Exists For Finding That The Teachers Were Police Agents

The Ohio Supreme Court relied solely on the mandatory-reporting duty to find that the teachers were police agents. Pet. App. 6a-9a. That was for good reason. This case offers no factual basis to consider whether *other* exceptions should exist to the rule that statements between private parties are non-testimonial.

The Court need not resolve whether statements objectively meant for the *police* should be viewed as non-testimonial because they were made to *private-party* "conduits" or "pass-throughs." *Compare State v. Jensen*, 727 N.W.2d 518, 521, 527-28 (Wis. 2007) (finding testimonial victim's letter given to neighbor for delivery to police "if anything happened to her"), *with People v. Richter*, 977 N.E.2d 1257, 1280-83 (Ill. Ct. App. 2012) (rejecting use of "conduit" theory for statements to private parties). Here, no evidence suggests that L.P. really meant for his statements to reach the police and used his teachers as conduits.

Nor need the Court consider when (if ever) police *direction* of private-party conversations can turn a private party into a police agent. Such police involvement best explains *Idaho v. Wright*, 497 U.S. 805 (1990), the only case in which this Court has used the Confrontation Clause to prohibit the admis-

sion of statements to a private party (a pediatrician examining a child). *Id.* at 818-25. The child's statements there were made after the police took her into custody, *id.* at 809; they took the child to the pediatrician "for physical examination and an interview," Br. of Respondent at 5, *Idaho v. Wright*, 497 U.S. 805 (1990) (No. 89-260), 1989 WL 1127314. It is questionable whether *Wright* remains valid after *Crawford*. If so, it should be read narrowly. Just as the constitutional ban on using a declarant's out-of-court sworn testimony cannot be evaded "by having a note-taking policeman *recite* the [declarant's] unsworn hearsay testimony," *Davis*, 547 U.S. at 826, it perhaps cannot be evaded by having the policeman pass the notebook to a private party to conduct the interrogation on the policeman's behalf. But this is *not* the case to decide when, if ever, police direction changes things. The teachers were not working with police when they spoke to L.P.

III. Even Under The Primary-Purpose Test Governing Police Interrogations, L.P.'s Statements Are Non-Testimonial

Assuming, lastly, that the primary-purpose test for police interrogation applies to L.P.'s statements to his daycare teachers, the Ohio Supreme Court mistakenly found the statements testimonial.

A. The Primary-Purpose Test Identifies The Declarant's Main Reason For A Statement Based On All Of The Circumstances

1. The primary-purpose test applies to "statements in response to police interrogation." *Davis*, 547 U.S. at 822. That test ultimately asks whether an out-of-court declarant made a statement "with a primary purpose of creating an out-of-court substi-

tute for trial testimony." *Bryant*, 131 S. Ct. at 1155. If so, the statement is testimonial; if not, it is not. *Id.* To answer this question, the Court "objectively evaluate[s] the circumstances in which the encounter occurs and the statements and actions of the parties." *Id.* at 1156. In other words, it "look[s] to all of the relevant circumstances," a fact-specific standard ensuring that courts do not "sacrifice accuracy for simplicity." *Id.* at 1162.

Under this test, "[t]he statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation." *Bryant*, 131 S. Ct. at 1160. Starting with the declarant, the Court looks to "the understanding and purpose of a reasonable [declarant] in the circumstances of the actual [declarant]—circumstances that prominently include the [declarant's] physical state." *Id.* at 1161-62. A "frantic" declarant, *Davis*, 547 U.S. at 827, and a declarant suffering from a gunshot wound, *Bryant*, 131 S. Ct. at 1165, are more likely to make non-testimonial statements than a declarant sitting in her living room under police protection, *Davis*, 547 U.S. at 830.

Turning to the questioner, "'[t]he identity of an interrogator, and the content and tenor of his questions,' can illuminate the 'primary purpose of the interrogation.'" *Bryant*, 131 S. Ct. at 1162 (citation omitted). Police officers, for example, "function as both first responders and criminal investigators"; these "dual responsibilities may mean that they act with different motives simultaneously or in quick succession." *Id.* at 1161. The type of interrogator and the nature of the interrogator's questions can help decide which of these roles was the *primary* one during a particular conversation.

Aside from the statements of the declarant and police agent, the Court looks to "the circumstances in which [the declarant] interacted with the" police agent. *Id.* at 1158. For example, "the existence of an 'ongoing emergency' at the time of an encounter between an individual and the [agent] is among the most important circumstances." *Id.* at 1157. Whether an emergency exists "is a highly context-dependent inquiry." *Id.* at 1158. It depends on the nature of the crime and the type of injury. *Id.* at 1158-59. Even if no emergency exists, moreover, statements are not thereby testimonial. *Bryant*, 131 S. Ct. at 1160. Not all statements can be pigeonholed into *either* emergency-response purposes *or* substitute-for-trial purposes. Rather, "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Id.* at 1155.

The Court also examines the *time* at which the questioning occurs. "'[I]nitial inquiries'"—such as immediate answers to questions during 911 calls—"may '*often* produce nontestimonial statements.'" *Id.* at 1166 (quoting *Davis*, 547 U.S. at 832). That is true even if the statements expressly accuse a suspect, because during an emergency police agents may "need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cnty.*, 542 U.S. 177, 186 (2004); *Davis*, 547 U.S. at 827. Follow-up answers to questions occurring later, by contrast, are more likely to be testimonial. *Davis*, 547 U.S. at 828-29.

Lastly, the Court has noted "the importance of *informality* in an encounter" with police agents. *Bryant*, 131 S. Ct. at 1160. Statements are more likely testimonial if they are "conducted in a separate room" from all others under a question-and-answer format. *Davis*, 547 U.S. at 830-31. Statements are more likely non-testimonial if "the questioning occur[s] in an exposed, public area" or in a hurried, "disorganized fashion." *Bryant*, 131 S. Ct. at 1160.

2. The Court has applied this primary-purpose test to three sets of facts. It held that statements a wife made to police about her husband's abuse after the police had separated the couple were testimonial. *Davis*, 547 U.S. at 820, 829-32. The wife made her statements during the officer's questioning about her version of events, and "the officer 'had her fill out and sign a battery affidavit.'" *Id.* at 820 (citation omitted). The Court found it "clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct," and that "[t]here was no emergency." *Id.* at 829-30.

The Court, by contrast, has found that a woman's allegations to a 911 operator that her former boyfriend was attacking her were non-testimonial. *Id.* "A 911 call, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." *Id.* at 827. The woman thus faced an "ongoing emergency" and her statements sought "help against bona fide physical threat." *Id.* Similarly, a shooting victim's pained statements to police were not "testimonial" because an ongoing emergency continued when they encountered him in a gas-station parking lot. *Bryant*, 131

S. Ct. at 1162-67. Among other things, the police did not know the location of the shooter, a gun was involved, the declarant's statements were made while "lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen," the questions asked of him were the type of questions necessary to assess the emergency, and the "situation was fluid and somewhat confused." *Id.*

B. The Primary Purpose Of L.P.'s Conversation With His Teachers Was Not To Create An Out-Of-Court Substitute For Trial

All of the circumstances—the teachers' perspective, L.P.'s perspective, and the environment in which they conversed—illustrate that L.P. did not identify Dee to his daycare teachers for the "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155.

Teachers' Perspective. The facts, objectively assessed, show that the teachers questioned L.P. to protect him and to secure the classroom—purposes that have nothing to do with investigating crime.

As a general matter, even if mandatory-reporting teachers qualify as police agents and trigger the primary-purpose test, that does not mean that their *actual* occupations fall by the wayside. The test is expansive enough to consider the "'identity of [the] interrogator.'" *Bryant*, 131 S. Ct. at 1162 (citation omitted). It is obvious that teachers and police perform fundamentally different roles in our society.

Unlike police, "[t]he primary duty of school officials and teachers is the education and training of young people." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring). When teachers question students about injuries, they will generally

have a purpose to protect the children and maintain a safe and structured learning environment. *Yates*, 808 N.E.2d at 870 ("Schoolteachers have a special responsibility to protect those children committed to their care and control."); Ohio Dep't of Educ., *Licensure Code of Professional Conduct for Ohio Educators*, at 2 (Mar. 22, 2008) ("An educator's responsibility includes nurturing the intellectual, physical, emotional, social, and civic potential of all students and providing a safe environment free from harassment, intimidation and criminal activity."), *available at* http://education.ohio.gov. In that regard, "[m]aintaining order in the classroom has never been easy." *T.L.O.*, 469 U.S. at 339.

A teacher's primary concern will rarely be gathering out-of-court evidence to ensure a criminal conviction. "A teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker." *Id.* at 353 (Blackmun, J., concurring). And while a "'teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute,'" *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) (citation omitted), the teacher has yet to take on the role of gumshoe. The teachers' occupation *alone* should go a long way toward finding a primary purpose other than creating an out-of-court substitute for trial testimony.

As a specific matter, the teachers' questions and actions show that their teaching-related duties drove the questioning. After noticing significant injuries to L.P., Whitley "was kind of like in shock." JA27. She immediately got the attention of the lead teacher, Jones, who asked, "Whoa, what happened." *Id.* These are not the words of police interrogators; they are

the spontaneous words of surprised adults upon seeing a bruised child. The initial questions—"Who did this? What happened to you?" JA59—are precisely the types of questions for assessing the situation that this Court has said often lead to non-testimonial answers. *See Bryant*, 131 S. Ct. at 1150 (asking "'what had happened, who had shot him, and where the shooting had occurred'" (citation omitted)); *Davis*, 547 U.S. at 818 (asking "do you know [the perpetrator's] last name?").

When, moreover, L.P. identified "Dee" in response to questions, the teachers did not know what he meant. JA59. During their conversation, it was unclear to them if L.P. had been injured by another child. And they had a duty to protect L.P. from harm at school. So Jones asked if Dee was "big or little, because [she] wanted to know was he talking about another child, because sometimes they'll say a brother or a sister hit him or somebody." JA60.

To be sure, Whitley agreed that she had a mandatory duty to report child abuse. JA37. Tellingly, however, neither of them was the *initial* individual to express that they should "make the 696 call" to report that abuse. JA32. Rather, it was the *supervisor* who did so, JA65, confirming that the teachers' reporting duty was far from their minds during the *initial* questioning of L.P.

L.P.'s Perspective. The facts, objectively considered, illustrate that L.P. was not focused on criminal proceedings when responding to his teachers' questions. Most notably, L.P. was only three-and-a-half-years old in March 2010. JA153. Just as the Court considered the victim's fatal wound in *Bryant*, 131 S. Ct. at 1161, it should consider the victim's tender age here. After all, the Court has already said that

the primary-purpose test incorporates "the circumstances of the actual" declarant, including the declarant's "physical state." *Id.* at 1161-62.

The Court, moreover, has already held that a similar objective test—the one asking whether a reasonable suspect would view himself in "custody" for *Miranda* purposes—*must* account for a suspect's youth. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402-05 (2011). *J.D.B.* was premised on the insight that a "child's age is far 'more than a chronological fact.' It is a fact that 'generates commonsense conclusions about behavior and perception.'" 131 S. Ct. at 2403 (citation omitted). The same is true here. Many lower courts have thus recognized that "a person's age is a pertinent characteristic for analysis" under the Confrontation Clause. *People v. Vigil*, 127 P.3d 916, 925-26 (Colo. 2006); *Commonwealth v. Allshouse*, 36 A.3d 163, 180-81 (Pa. 2012); *State v. Scacchetti*, 690 N.W.2d 393, 396 (Minn. Ct. App. 2005).

L.P.'s age should be all but dispositive for determining his purpose in answering his teachers. Perhaps even more so than "[a] severely injured victim," a small child "may have no purpose at all in answering questions posed; the answers may be simply reflexive." *Bryant*, 131 S. Ct. at 1161. That certainly seems the case for L.P. When responding to his teachers' questions, he reflexively said "I fell" and then implicated "Dee" while in a "bewildered" state. JA27, 32, 59-60. Nothing suggests he had any particular purpose in mind when doing so.

Circumstances of Questioning. Lastly, an evaluation of the circumstances in which L.P conversed with his teachers confirms that his statements to them were not testimonial. The "highly context-dependent inquiry" for determining whether an

emergency exists shows that one existed here. *Bryant*, 131 S. Ct. at 1158. When confronted with an injured *child*, teachers "need to know whom they are dealing with in order to assess the possible danger to [that] victim." *Hiibel*, 542 U.S. at 186. They will be concerned about sending children home with the very individual who may be abusing them. It is a tragic fact that abuse routinely occurs in the home. *See* David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 The Future of Children 46 (1994). Thus, what one court said about parents is true about teachers—to "characterize such questioning as the gathering of evidence for purposes of litigation would unnecessarily and undesirably militate against a [teacher's] ability to support and nurture a child at a time when the child most needs that support." *Pantano v. State*, 138 P.3d 477, 483 (Nev. 2006).

The "*informality* in [this] encounter" also cannot go overlooked. *Bryant*, 131 S. Ct. at 1160. The open-ended questions occurred "in the classroom" "aside from the other children." JA45; *see* JA27, 58. Jones only later took L.P. to the supervisors' office for a closer examination; she downplayed the emergency in the classroom so as not to alarm other children or embarrass L.P. JA58. Jones's actions, in other words, are a prototypical example why the Court has "respected the value of preserving the informality of the student-teacher relationship." *T.L.O.*, 469 U.S. at 340 (citing *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975)). Further, the questions to L.P. were the "'initial inquiries'" by adults to L.P. about the abuse. *Bryant*, 131 S. Ct. at 1166 (citation omitted). They were not second-level interviews.

* * * *

In sum, a totality-of-the-circumstances analysis under the primary-purpose test shows that L.P. did not implicate Clark with the primary purpose of creating an out-of-court substitute for trial testimony. More than that, it shows how unnecessary that fact-specific test is here. The test, while suited for close cases involving police interrogations in the field, is ill-suited for cases like this one involving a young child's statements meant *solely* for private parties without *any* police involvement. That type of hearsay is not testimonial "under any definition." *Crawford*, 541 U.S. at 60. While "[s]impler is not always better," sometimes it is. *Bryant*, 131 S. Ct. at 1162. It is better for prior testimony; it is better for formal custodial police interrogation; and it is better for statements like those L.P. made to his teachers.

CONCLUSION

The Ohio Supreme Court's judgment should be reversed, and the case should be remanded for proceedings consistent with this Court's decision.

Respectfully submitted,

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APPENDIX

Ohio Revised Code § 2151.421. Persons required to report injury or neglect; procedures on receipt of report.

(A)

(1)

(a) No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, the person making the report shall make it to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. In the circumstances described in section 5120.173 of the Revised Code, the person making the report shall make it to the entity specified in that section.(b)Division (A)(1)(a) of this section applies to any person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist; practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other health care professional; licensed psychologist; li-

censed school psychologist; independent marriage and family therapist or marriage and family therapist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; administrator or employee of a residential camp or child day c administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority; person engaged in social work or the practice of professional counseling; agent of a county humane society; person, other than a cleric, rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion; employee of a county department of job and family services who is a professional and who works with children and families; superintendent or regional administrator employed by the department of youth services; superintendent, board member, or employee of a county board of developmental disabilities; investigative agent contracted with by a county board of developmental disabilities; employee of the department of developmental disabilities; employee of a facility or home that provides respite care in accordance with section 5123.171 of the Revised Code; employee of a home health agency; employee of an entity that provides homemaker services; a person performing the duties of an assessor pursuant to Chapter 3107. or 5103. of the Revised Code; or third party employed by a public children services agency to assist in providing child or family related services.

(b) Division (A)(1)(a) of this section applies to any person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist; practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other

health care professional; licensed psychologist; licensed school psychologist; independent marriage and family therapist or marriage and family therapist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; administrator or employee of a residential camp or child day c administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority; person engaged in social work or the practice of professional counseling; agent of a county humane society; person, other than a cleric, rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion; employee of a county department of job and family services who is a professional and who works with children and families; superintendent or regional administrator employed by the department of youth services; superintendent, board member, or employee of a county board of developmental disabilities; investigative agent contracted with by a county board of developmental disabilities; employee of the department of developmental disabilities; employee of a facility or home that provides respite care in accordance with section 5123.171 of the Revised Code; employee of a home health agency; employee of an entity that provides homemaker services; a person performing the duties of an assessor pursuant to Chapter 3107. or 5103. of the Revised Code; third party employed by a public children services agency to assist in providing child or family related services; court appointed special advocate; or guardian ad litem.

(2)

(3)

(4)

(B) Anyone who knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in similar circumstances to suspect, that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired person under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect of the child may report or cause reports to be made of that knowledge or reasonable cause to suspect to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, a person making a report or causing a report to be made under this division shall make it or cause it to be made to the public children services agency or to a municipal or county peace officer. In the circumstances described in section 5120.173 of the Revised Code, a person making a report or causing a report to be made under this division shall make it or cause it to be made to the entity specified in that section.

(C) Any report made pursuant to division (A) or (B) of this section shall be made forthwith either by telephone or in person and shall be followed by a written report, if requested by the receiving agency or officer. The written report shall contain:

(1) The names and addresses of the child and the child's parents or the person or persons having custody of the child, if known;

(2) The child's age and the nature and extent of the child's injuries, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to have occurred or of the threat of injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to exist, including any evidence of previous injuries, abuse, or neglect;

(3) Any other information that might be helpful in establishing the cause of the injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to have occurred or of the threat of injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to exist.

Any person, who is required by division (A) of this section to report child abuse or child neglect that is known or reasonably suspected or believed to have occurred, may take or cause to be taken color photographs of areas of trauma visible on a child and, if medically indicated, cause to be performed radiological examinations of the child.

(D) As used in this division, "children's advocacy center" and "sexual abuse of a child" have the same meanings as in section 2151.425 of the Revised Code.

(1) When a municipal or county peace officer receives a report concerning the possible abuse or neglect of a child or the possible threat of abuse or neglect of a child, upon receipt of the report, the municipal or county peace officer who receives the report shall refer the report to the appropriate public children services agency.

(2) When a public children services agency receives a report pursuant to this division or division (A) or (B) of this section, upon receipt of the report, the public children services agency shall do both of the following:

(a) Comply with section 2151.422 of the Revised Code;

(b) If the county served by the agency is also served by a children's advocacy center and the report alleges sexual abuse of a child or another type of abuse of a child that is specified in the memorandum of understanding that creates the center as being within the center's jurisdiction, comply regarding the

report with the protocol and procedures for referrals and investigations, with the coordinating activities, and with the authority or responsibility for performing or providing functions, activities, and services stipulated in the interagency agreement entered into under section 2151.428 of the Revised Code relative to that center.

(E) No township, municipal, or county peace officer shall remove a child about whom a report is made pursuant to this section from the child's parents, stepparents, or guardian or any other persons having custody of the child without consultation with the public children services agency, unless, in the judgment of the officer, and, if the report was made by physician, the physician, immediate removal is considered essential to protect the child from further abuse or neglect. The agency that must be consulted shall be the agency conducting the investigation of the report as determined pursuant to section 2151.422 of the Revised Code.

(F)

(1) Except as provided in section 2151.422 of the Revised Code or in an interagency agreement entered into under section 2151.428 of the Revised Code that applies to the particular report, the public children services agency shall investigate, within twenty-four hours, each report of child abuse or child neglect that is known or reasonably suspected or believed to have occurred and of a threat of child abuse or child neglect that is known or reasonably suspected or believed to exist that is referred to it under this section to determine the circumstances surrounding the injuries, abuse, or neglect or the threat of injury, abuse, or neglect, the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible. The investigation shall be made in cooperation

with the law enforcement agency and in accordance with the memorandum of understanding prepared under division (J) of this section. A representative of the public children services agency shall, at the time of initial contact with the person subject to the investigation, inform the person of the specific complaints or allegations made against the person. The information shall be given in a manner that is consistent with division (H)(1) of this section and protects the rights of the person making the report under this section.

A failure to make the investigation in accordance with the memorandum is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from the report or the suppression of any evidence obtained as a result of the report and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person. The public children services agency shall report each case to the uniform statewide automated child welfare information system that the department of job and family services shall maintain in accordance with section 5101.13 of the Revised Code. The public children services agency shall submit a report of its investigation, in writing, to the law enforcement agency.

(2) The public children services agency shall make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect any children that are brought to its attention.

(G)

(1)

(a) Except as provided in division (H)(3) of this section, anyone or any hospital, institution, school, health department, or agency participating in the

making of reports under division (A) of this section, anyone or any hospital, institution, school, health department, or agency participating in good faith in the making of reports under division (B) of this section, and anyone participating in good faith in a judicial proceeding resulting from the reports, shall be immune from any civil or criminal liability for injury, death, or loss to person or property that otherwise might be incurred or imposed as a result of the making of the reports or the participation in the judicial proceeding.

(b) Notwithstanding section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries, abuse, or neglect, or the cause of the injuries, abuse, or neglect in any judicial proceeding resulting from a report submitted pursuant to this section.

(2) In any civil or criminal action or proceeding in which it is alleged and proved that participation in the making of a report under this section was not in good faith or participation in a judicial proceeding resulting from a report made under this section was not in good faith, the court shall award the prevailing party reasonable attorney's fees and costs and, if a civil action or proceeding is voluntarily dismissed, may award reasonable attorney's fees and costs to the party against whom the civil action or proceeding is brought.

(H)

(I) Any report that is required by this section, other than a report that is made to the state highway patrol as described in section 5120.173 of the Revised Code, shall result in protective services and emergency supportive services being made available by the public children services agency on behalf of the

children about whom the report is made, in an effort to prevent further neglect or abuse, to enhance their welfare, and, whenever possible, to preserve the family unit intact. The agency required to provide the services shall be the agency conducting the investigation of the report pursuant to section 2151.422 of the Revised Code.

(J)

(1) Each public children services agency shall prepare a memorandum of understanding that is signed by all of the following:

(a) If there is only one juvenile judge in the county, the juvenile judge of the county or the juvenile judge's representative;

(b) If there is more than one juvenile judge in the county, a juvenile judge or the juvenile judges' representative selected by the juvenile judges or, if they are unable to do so for any reason, the juvenile judge who is senior in point of service or the senior juvenile judge's representative;

(c) The county peace officer;

(d) All chief municipal peace officers within the county;

(e) Other law enforcement officers handling child abuse and neglect cases in the county;

(f) The prosecuting attorney of the county;

(g) If the public children services agency is not the county department of job and family services, the county department of job and family services;

(h) The county humane society;

(i) If the public children services agency participated in the execution of a memorandum of understanding under section 2151.426 of the Revised Code establishing a children's advocacy center, each participating member of the children's advocacy center established by the memorandum.

(2) A memorandum of understanding shall set forth the normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilities under this section and division (C) of section 2919.21, division (B)(1) of section 2919.22, division (B) of section 2919.23, and section 2919.24 of the Revised Code and shall have as two of its primary goals the elimination of all unnecessary interviews of children who are the subject of reports made pursuant to division (A) or (B) of this section and, when feasible, providing for only one interview of a child who is the subject of any report made pursuant to division (A) or (B) of this section. A failure to follow the procedure set forth in the memorandum by the concerned officials is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from any reported case of abuse or neglect or the suppression of any evidence obtained as a result of any reported child abuse or child neglect and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person.

(3) A memorandum of understanding shall include all of the following:

(a) The roles and responsibilities for handling emergency and nonemergency cases of abuse and neglect;

(b) Standards and procedures to be used in handling and coordinating investigations of reported cases of child abuse and reported cases of child neglect, methods to be used in interviewing the child who is the subject of the report and who allegedly was abused or neglected, and standards and procedures addressing the categories of persons who may interview the child who is the subject of the report and who allegedly was abused or neglected.

(4) If a public children services agency participated in the execution of a memorandum of understanding under section 2151.426 of the Revised Code establishing a children's advocacy center, the agency shall incorporate the contents of that memorandum in the memorandum prepared pursuant to this section.

(5) The clerk of the court of common pleas in the county may sign the memorandum of understanding prepared under division (J)(1) of this section. If the clerk signs the memorandum of understanding, the clerk shall execute all relevant responsibilities as required of officials specified in the memorandum.

(K)

(L) The director of job and family services shall adopt rules in accordance with Chapter 119. of the Revised Code to implement this section. The department of job and family services may enter into a plan of cooperation with any other governmental entity to aid in ensuring that children are protected from abuse and neglect. The department shall make recommendations to the attorney general that the department determines are necessary to protect children from child abuse and child neglect.

(M) Whoever violates division (A) of this section is liable for compensatory and exemplary damages to the child who would have been the subject of the report that was not made. A person who brings a civil action or proceeding pursuant to this division against a person who is alleged to have violated division (A)(1) of this section may use in the action or proceeding reports of other incidents of known or suspected abuse or neglect, provided that any information in a report that would identify the child who is the subject of the report or the maker of the report,

if the maker is not the defendant or an agent or employee of the defendant, has been redacted.

(N) .

(O) As used in this section, "investigation" means the public children services agency's response to an accepted report of child abuse or neglect through either an alternative response or a traditional response.

RESPONDENT'S BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On a Writ of Certiorari
to the Supreme Court of Ohio

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QUESTION PRESENTED

"When teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator," Pet. App. 9a, are answers a child gives to the teachers' questions testimonial under the Confrontation Clause?

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BRIEF FOR RESPONDENT

Respondent Darius Clark respectfully requests that this Court affirm the judgment of the Ohio Supreme Court.

STATEMENT OF THE CASE

Shortly after this Court decided *Ohio v. Roberts*, 448 U.S. 56 (1980), states began enacting new hearsay exceptions allowing children's statements describing past abuse to be admitted in criminal trials in lieu of live testimony. This case involves whether the admission of such a statement violated the Confrontation Clause.

A. Legal Background

1. Historically, it was "settled" that when prosecuting child abuse cases, "infants of any age are to be heard," allowing the jury "to hear the narration of the child herself, [rather] than to receive it at second hand from those who swear they heard her say so." 4 William Blackstone, Commentaries on the Laws of England 214 (1769). Over time, however, many jurisdictions became skeptical of juries' ability to assess the veracity of such testimony. So the jurisdictions adopted strict competency requirements. These requirements forbade children from testifying unless they were capable of demonstrating in pretrial hearings that they could (i) receive and relay accurate impressions of perceived events and (ii) differentiate between truth and lies. *See, e.g.*, 2 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law ("Wigmore on Evidence") § 506 (3d ed. 1940).

These competency requirements came at a price. "The admission of hearsay statements" traditionally "presupposes that the assertor possessed the qualifications as a witness." 5 Wigmore on Evidence § 1424 (emphasis removed). So jurisdictions understood that if they deemed children incompetent to testify, the prosecution could not introduce any prior accusations the children made. *See, e.g.*, 4 William Blackstone, Commentaries on the Laws of England 214 (1783 ed.); Kenneth S. Broun et al., McCormick on Evidence § 61 n.3 (6th ed. 2006). But, for many years, lawmakers were content to accept that trade-off.

2. In the latter part of the twentieth century, states began to pay fresh attention to the problem of child abuse. As part of this movement, states began in the 1960's to enact "mandatory reporter" laws. Petr. Br. 38. These laws required various professionals, including teachers, to report suspected instances of child abuse, in part so that law enforcement agencies could identify and prosecute offenders. *See, e.g.*, Br. of Child Justice 2-6. Yet even when such reports were made, many jurisdictions' competency statutes continued to prevent children from testifying in court against their alleged abusers. And because "there are often no witnesses [to child abuse] except the victim," *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987), prosecutions sometimes foundered.

In the early 1980's, the federal government funded two studies to address this situation. First, the federal government awarded a grant to the ABA's National Legal Resource Center for Child Advocacy and Protection. The Center, in turn, formed an

"expert review panel" of advocates for abused children: the Executive Director of the National Committee for the Prevention of Child Abuse and other child abuse specialists; a former president of the National District Attorneys Association and other prosecutors; law professors; and judges. Nat'l Legal Res. Ctr. for Child Advocacy & Prot., Am. Bar Ass'n, *Recommendations for Improving Legal Intervention in* Intrafamily Child Sexual Abuse Cases i-ii (1982) ("*Recommendations*"). Second, U.S. Attorney General William French Smith formed a Task Force, comprised of one U.S. Senator (John Ashcroft), plus various law enforcement and child advocacy officials. U.S. Dep't of Justice, *Attorney General's Task Force on Family Violence* (1984) ("*Task Force*").

The two working groups issued reports recommending that children "be considered competent witnesses," as they had been historically, and "allowed to testify without prior qualification in any judicial proceeding." *Recommendations* at 30; *see also Task Force* at 39 ("Children, regardless of their age, should be presumed to be competent to testify in court."). In making this recommendation, the ABA Expert Panel stressed that the Federal Rules of Evidence already had abolished any competency requirement for children, *see* Fed. R. Evid. 601, and that "[a] trend [was] developing in state statutes" to do the same. *Recommendations* at 30. Under these provisions, the experts explained, it is up to "[t]he trier of fact" to "determine the weight and credibility to be given to the testimony." *Recommendations* at 30; *accord Task Force* at 39. "[A]lthough very young children, usually under four years, may not have sufficient perception, memory, or narration abilities, these deficiencies [should] simply

affect the credibility of the child's testimony," not its admissibility. *Recommendations* at 31.

As a means of implementing this reform while minimizing stress and trauma to children, the Attorney General's Task Force and other child advocacy specialists also urged legislatures and judges to "adopt special rules and procedures [to enable child victims] to more comfortably and effectively communicate the harm they have suffered." *Task Force* at 38; *see also* Kee MacFarlane, *Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 Miami L. Rev. 135, 146-49 (1985-86). "For instance," the Task Force suggested, "testimony could be videotaped in a therapeutic atmosphere," with questioning "done by an objective therapist in a relaxed setting with one-way mirrors." *Task Force* at 39. And to "safeguard the rights of the accused" under the Confrontation Clause, "[t]he person questioning the child could be fitted with an earpiece to allow questions from the prosecutor and defense attorney to be presented in a nonthreatening manner." *Id.*; *see also State v. Melendez*, 661 P.2d 654, 656-67 (Ariz. Ct. App. 1982) (holding that use of this method of testifying satisfied Confrontation Clause because "[d]efendant and his counsel were present during the videotaping and the opportunity to cross-examine the victim was made available at that time").

3. Around the same time these reforms were proposed and several states had begun successfully implementing them, this Court decided *Ohio v. Roberts*, 448 U.S. 56 (1980). In that case, this Court held that the Confrontation Clause permitted the prosecution to introduce nontestifying witnesses' out-

of-court statements against the accused – even if the statements were made expressly to aid criminal prosecutions – so long as judges deemed the statements to bear "particularized guarantees of trustworthiness." *Id.* at 66. This decision signaled an alternative way of facilitating the prosecution of child abuse cases. Instead of relaxing competency requirements, states seemingly could revise their hearsay rules to enable prosecution of child abuse cases solely by out-of-court statements deemed "reliable" by trial judges – eliminating any need whatsoever for children to testify subject to cross-examination.

The reform that had been proceeding with respect to competency laws halted in its tracks. While the seventeen or so states that, starting in the 1970's, had abolished their competency requirements left those changes in place,[1] virtually no new states

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[1] These seventeen states fall into two camps. First, thirteen states have abolished competency requirements along the lines of Federal Rule 601. *See* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 806, 819 n.89 (1985). Those states are Alabama, Arizona, Arkansas, Indiana, Iowa, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Wisconsin, and Wyoming. *See* National District Attorney's Association, *Legislation and Case Law Regarding the Competency of Child Witnesses to Testify in Criminal Proceedings* (March 2011) (collecting state statutory provisions), *available at* http://www.ndaa.org/pdf/Competency%20of%20Child%20Witnesses(2011).pdf. Second, at least four other states have statutes specifically deeming children competent to testify in child abuse cases. *See* Conn. Gen. Stat. § 54-86h; Ga. Code Ann. § 24-6-603(b); Mo. Rev. Stat. § 491.060(2); Utah Code Ann. § 76-5-410.

followed their lead. Instead, several states – starting with Washington State in 1982 – enacted "special exception[s]" to their hearsay codes for out-of-court statements by children describing past child abuse. Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 806, 808 (1985). Ohio's Rule of Evidence 807, enacted in 1991 (and reproduced in full in the Appendix), is typical: It provides that any "out-of-court statement made by a child who is under twelve years of age at the time of trial describing [physical or sexual abuse] is not excluded as hearsay" – even if made to police officers or other investigating authorities – provided certain criteria are met. Ohio R. Evid. 807(A).

One of Rule 807's required criteria is that "the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement [sufficiently] reliable." Ohio R. Evid. 807(A)(1). But the Ohio Supreme Court – again following Washington's lead, and again departing from traditional hearsay law – has held that even if a court deems a child at the time of trial to be incompetent to testify, the child's pretrial out-of-court accusations can be deemed sufficiently reliable to be introduced under the special child hearsay exception. Petr. Cert. Reply 10 (citing *State v. Silverman*, 906 N.E.2d 427, 432 (Ohio 2009), and *State v. C.J.*, 63 P.3d 765, 770 (Wash. 2003)). The Ohio Supreme Court has never explained how a child incapable at the time of trial of receiving and relaying accurate information or understanding the duty to tell the truth could previously have made accusatory statements having "particularized guarantees of

trustworthiness" such that cross-examination would be futile. But courts in Ohio and other states sometimes find that seemingly incongruous situation to be present. *Id.*

4. Shortly after states enacted these special hearsay exceptions – and especially as courts began to hold that these exceptions allowed prosecutors to introduce out-of-court statements from children that trial courts deemed incompetent to testify – commentators and judges began to question whether the exceptions, at least under some circumstances, violated the Confrontation Clause. *See, e.g.*, Note, 98 Harv. L. Rev., *supra*, at 808-09; *State v. Lanam*, 459 N.W.2d 656, 662-68 (Minn. 1990) (Kelley, J., dissenting). Even during the *Roberts* era, this Court expressed reservations concerning whether state law could deem a child incompetent and simultaneously admit the child's prior out-of-court accusations to authority figures investigating whether abuse occurred. *Idaho v. Wright*, 497 U.S. 805, 815-16 (1990) (reserving the issue whether incompetency could constitute "unavailability" under *Roberts* framework). But instead of directly addressing that question, this Court resolved the only such case it heard during that era on narrower grounds, holding that the admission of an incompetent child's statements to a physician who had examined her for signs of abuse violated the Confrontation Clause because the statements lacked "particularized guarantees of trustworthiness." *Id.* at 825-27.

Rather than taking *Wright* as a warning, many states pressed ahead, continuing to base prosecutions on out-of-court accusations of abuse from children

they deemed incompetent – and thus not reliable enough – to testify.

5. In 2004, this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* abandoned *Roberts*' framework insofar as it "allow[ed] a jury to hear [testimonial] evidence, untested by the adversary process, based on a mere judicial determination of reliability." *Crawford*, 541 U.S. at 62. Under *Crawford*'s reinstatement of the Confrontation Clause's traditional mode of operation, the prosecution generally may not introduce out-of-court testimonial statements unless the declarant testifies at trial. *Id.* at 68. Following that decision, the potential problem this Court identified in *Wright* with respect to the interaction between state competency and hearsay laws has taken on added significance, and it is at the center of this case.

B. Factual and Procedural History

1. In the spring of 2010, L.P. was three-and-one-half years old; his sister, A.T., was eighteen months old. The children lived with their mother, Taheim T. Respondent Darius ("Dee") Clark was Taheim's boyfriend.

Taheim has five children and "an extensive history" with the Cuyahoga County Department of Children and Family Services (CFS). J.A. 96, 139. Before the events giving rise to this case, CFS had already severed Taheim's parental rights with respect to her three older children due to abuse or neglect, as well as her own substance abuse. *Id.* 139; *see also* Ohio Rev. Code § 2151.353(A). And it seems that Taheim treated the younger children no better than she had the older ones. A family friend once saw her "whip[] [L.P.] with the little strap of her

purse" over an argument concerning potato chips. Tr. 670-71. She also "spanked him" when "he wouldn't go to sleep," and she "whooped that baby [A.T.] a lot." *Id.* Furthermore, according to Taheim's mother and aunt, Taheim "is a big liar and you can't trust a word that she says." J.A. 139.

On March 16, 2010, Taheim picked up L.P. from preschool. Tr. 549. The boy had no observable injuries. *Id.*; J.A. 31, 67. Taheim was with him the rest of the afternoon and evening until she put him to sleep. Tr. 549. At around midnight, she caught a Greyhound bus to Washington, D.C. to engage in prostitution. *Id.* 548.[2] Because Taheim knew that her mother and aunt disapproved of what she was doing, *id.* 537, she left L.P. and A.T. at her house under respondent's care, *id.* 553-54. The children knew respondent well, *id.* 585, and neither Taheim nor anyone else had ever seen respondent hurt them, *see, e.g.*, 585, 670.

The next day, respondent dropped L.P. off at school. J.A. 36. While in the lunchroom, the assistant teacher, Ramona Whitley, noticed some red marks on his face. *Id.* 27. When she asked if something had happened, L.P responded, "I don't know. I hurt myself. I fell." *Id.* 32. Whitley did not pursue the matter because L.P. had not complained of any pain and did not seem in need of medical care. *Id.* 27, 44-45; Pet. App. 9a.

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[2] Taheim later claimed that respondent was her pimp, but neither she nor the State has ever offered anything but her word to support this claim. Tr. 532, 538, 573.

In the brighter light of the classroom, however, it was apparent that L.P.'s face had been struck with "whips of some sort." J.A. 27. As a CFS worker later explained, "[i]t was obvious when you looked at him" that he had been the victim of "child abuse." *Id.* 100. "Immediately upon seeing him, you could see there was a loop-shaped mark from about the side of his face by his [ear] and it went through the corner of his eye and back; and then there was broken blood vessels." *Id.*; *see also* Pet. App. 16a (L.P.'s teachers "immediately suspected child abuse").

Whitley, like other teachers in Ohio, is a "mandatory reporter" and had been "trained" to call a government hotline – 696-KIDS – when suspecting child abuse. J.A. 36-37; *see also* Ohio Rev. Code § 2151.421(A)(1). This hotline goes straight to CFS and triggers "investigat[ions]" for abuse and neglect that state law, as well as CFS's internal policies, require it to conduct "in cooperation with the [local] law enforcement agency." J.A. 135-36; Ohio Rev. Code § 2151.421(F)(1); *see also* Cuyahoga County Department of Children and Family Services Policy Statement, Standards for the Investigation of Intake Reports § H (effective May 24, 1996), *available at* http://cfs.cuyahogacounty.us/pdf_cfs/en-US/20300.pdf; J.A. 90, 103, 105, 126; Pet. App. 8a. Callers to the hotline are asked to report, among other information, "who did this alleged abuse or neglect." J.A. 134. And state law provides that "[i]n a criminal proceeding, the report is admissible in evidence in

accordance with the Rules of Evidence." Ohio Rev. Code § 2151.421(H)(1).[3]

Whitley summoned the head teacher, Debra Jones, and they pulled L.P. "aside from the other children" to question him. J.A. 45. Consistent with her training and local policy, Jones asked, "Who did this? What happened to you?" *Id.* 59. "[D]id [you] get a spanking?" *Id.* 79. Looking "kind of bewildered" and "uncertain," L.P responded "something like Dee, Dee." *Id.* 59; Pet. App. 4a. Jones "repeated his words back," saying, "What did you say? Dee? Dee did this?" J.A. 60.

After L.P. responded affirmatively to this reinforcement, Jones pressed for more information "because sometimes they'll say a brother or sister hit him or somebody." J.A. 60. "[W]ho is Dee?," she asked. *Id.* "Is Dee big or little?" *Id.* 61. L.P "kept looking kind of bewildered," *id.* 61-62, and "wouldn't answer," *id.* 79. Jones then asked the question again while gesturing with her arms. *Id.* 60, 79. L.P. "didn't say that Dee was big," but "[h]e might have shook his head a little bit," to indicate big. *Id.* 62.

After these "few minutes" of questioning, J.A. 78, Jones concluded "that's all I can get out of him right now," *id.* 62. Accordingly, she took L.P to her supervisor's office. Jones wasn't "sure if he [had] understood the questions" she had asked him. *Id.* 80-

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[3] Ohio's statute concerning mandatory reporting and "procedures on receipt of [such] report[s]" is reproduced in part in the appendix to the State's brief. For some reason, the appendix does not contain the subsection rendering reports admissible in evidence. App. to Petr. Br. 8a.

82. But Jones and her supervisor decided they had "enough to make the call" to 696-KIDS. *Id.* 66. And because Whitley had been the first to observe L.P.'s injuries, they had her make the report. *Id.* 65. Whitley made the call "regarding allegations of physical abuse" and named "Darius Clark as an alleged perpetrator." *Id.* 91, 134; *see also* Pet. App. 52a.

CFS, in coordination with the Cleveland Police Department, sprang into action. CFS dispatched a social worker, Howard Little, to the school. Little interviewed L.P. and asked what had happened. J.A. 145-46. L.P. responded that he had fallen. *Id.* 146. But when Little "re-questioned" him later, L.P. "stated that the bruises came from Dee." J.A. 146. Respondent later arrived at school and picked up the boy. *Id.* 150-51.

The next day, CFS worker Sarah Bolog called Taheim to relay her "concerns regarding child abuse." J.A. 94. Taheim responded with "an obvious lie." *Id.* 96. She said that L.P. "didn't have any marks on him" and accused the preschool teachers of "making this up." *Id.* 94. Even though Taheim was still in Washington, D.C., Taheim further claimed that L.P. and A.T. were with her and that she was about to take L.P for treatment for pink eye. *Id.*

Later that day, Bolog and her supervisor continued the investigation by going to respondent's mother's house. J.A. 99-107. Two Cleveland police officers would follow closely behind. *Id.* 103, 105. As soon as Bolog saw L.P.'s injuries and observed that A.T. had two black eyes and a burn on her cheek, Bolog texted Detective Remington of the Cleveland Police Department to confirm that she was "going to

need" police assistance. *Id.* 100-02, 103. The officers on the scene then decided to have the children go to the hospital for an evaluation, where Detective Remington would await their arrival.

Before leaving the home, Bolog and her supervisor re-interviewed L.P. J.A. 128. As Bolog later explained, calls to the 696-KIDS hotline "oftentimes" include "false allegations," so she wanted to explore the veracity of L.P.'s accusation that "Dee did it" for herself. J.A. 135. The supervisor accordingly asked L.P., "how did you get this mark on your face?" *Id.* 128. L.P. "said, Daddy did it. Dee did it." *Id.* At the hospital, Detective Remington also offered L.P. a pink stuffed animal, showed L.P a picture of respondent, and asked "if he knew who this was." J.A. 128-29. L.P. "said again, Dee did it." *Id.* 129. Sometime later, L.P. repeated the accusation again, telling his maternal grandmother and great-aunt that respondent caused his and A.T.'s injuries. Pet. App. 63a-64a.

The physician who examined L.P. determined that he had "abrasions consistent with being struck by a linear object" and "bruising in several stages of development" on his torso and face. Pet. App. 5a. The physician found that A.T. had "bruising, burn marks, a swollen hand, and a pattern of sores at her hairline." *Id.* A.T. also had "some hair loss" and "skin that[had] been picked and bleeding," but the physician could not "make any determination as to either the cause or age" of that condition. Tr. 357. The physician estimated that the children's injuries had occurred sometime over the preceding three weeks. Pet. App. 5a.

When Bolog and Taheim's mother told Taheim about the physician's findings and L.P.'s allegations of abuse, Taheim decided to stay in Washington, D.C. Tr. 580-82. She did not return to Cleveland until she was extradited five months later. Tr. 566-67, 582-83.

2. The State charged respondent with one count of felonious assault relating to L.P., four counts of felonious assault related to A.T., two counts of endangering children, and two counts of domestic violence. The State also levied an eleven-count indictment against Taheim, alleging various counts of felonious assault, child endangerment, and permitting child abuse. Tr. 566-71. Facing the possibility of over fifty years in prison, *see id.*, Taheim pleaded guilty to child endangerment and permitting child abuse and agreed to testify against respondent, *id.* 562, 566-71. In exchange, the State dropped all of the remaining charges against her. Taheim's sentencing, however, was held open until respondent's trial was complete.

Ohio retains a strict competency regime, presuming that all children younger than ten are incompetent to testify unless they demonstrate the ability to perceive and narrate events and to distinguish between truth and falsehood. *See* Ohio R. Evid. 601(A). Thus, the trial judge began respondent's trial by holding a pretrial hearing to determine whether L.P. was competent to testify. J.A. 4-12. After L.P. gave varying answers concerning his birthday, his sister's age, and the adults with whom he had lived, the trial court held that "[h]e will not be able to testify as a witness." *Id.* 12. At the same time, the trial court held (over respondent's objection) that L.P.'s out-of-court

accusations to the teachers, social workers, police officer, grandmother, and great-aunt were admissible under Ohio R. Evid. 807 on the ground that they contained "particularized guarantees of trustworthiness." *Id.* 13, 15, 21-24.

Respondent moved in limine to exclude L.P.'s out-of-court accusations on Confrontation Clause grounds. He argued that the "constitutional right" enunciated in *Crawford v. Washington*, 541 U.S. 36 (2004) – namely, the right not to be convicted based on testimonial statements from witnesses who are not subject to cross-examination – "trumps" Rule 807 here. J.A. 13. "Bottom line," respondent contended, "the State is trying to make [L.P.'s] statement competent, trustworthy, and everything by bringing it in through these other people without the jury having the ability to see the young child," and that's "violative of *Crawford*." J.A. 17.

The trial court summarily denied the motion. J.A. 20-24. The trial court also denied respondent's fall-back request to at least instruct the jury that L.P. was not testifying because he had been deemed incompetent. Tr. 657-60.

The central issue at trial was whether respondent or Taheim inflicted L.P.'s and A.T.'s injuries. The "only direct evidence" implicating respondent as the one who abused either child was L.P.'s accusatory statements. Pet. App. 68a. In closing arguments, therefore, the prosecution focused on those accusations, repeatedly telling the jury that "when this young three-year-old with numerous injuries is asked, What happened to you? Who did this to you? He said Dee." Tr. 685; *see also* Tr. 696.

The jury found respondent guilty of all of the charges except one related to A.T. The trial court sentenced him to twenty-eight years' imprisonment. It subsequently sentenced Taheim to eight years' imprisonment.

3. The Ohio Court of Appeals reversed, holding that L.P.'s statements to all seven adults that "Dee did it" should have been excluded at trial. Pet. App. 54a-55a, 69a. As the court of appeals framed its inquiry, it first considered the "threshold" question whether the statements were testimonial, such that the Confrontation Clause barred their introduction. *Id.* 55a. To the extent it found statements to be nontestimonial, the court of appeals assessed whether they satisfied Ohio R. Evid. 807. *Id.* 63a.

The court of appeals held that L.P.'s statements to the teachers were testimonial because "the primary purpose" of these statements was to establish – "in response to investigative questions" – who abused L.P. to aid law enforcement. Pet. App. 63a, 66a. It reached the same conclusion with respect to the statements made to the social workers and Detective Remington. *Id.* 58a-62a.

The court of appeals treated L.P.'s statements to his grandmother and great-aunt as nontestimonial. *Id.* 63a-64a. But the court of appeals held that these statements failed to satisfy two of the four prerequisites for admission under Rule 807: (1) the record lacked any "independent proof" to corroborate the statements' assertions that respondent committed the abuse; and (2) the statements lacked "particularized guarantees of trustworthiness." Pet. App. 65a-68a; *see also* Pet. App. 64a-65a (reciting the four prerequisites, "all" of which must be satisfied).

4. The State sought discretionary review in the Ohio Supreme Court. The State did not challenge the court of appeals' determination that L.P.'s statements to the police and social workers were testimonial. Pet. App. 6a. Neither did the State dispute the court of appeals' holding that his statements to the grandmother and great-aunt were inadmissible under Rule 807. Instead, the State sought only an advisory opinion concerning whether the court of appeals erred in holding that L.P.'s statements to the teachers were testimonial.[4]

The Ohio Supreme Court granted review and affirmed. The court began by explaining that under Ohio's mandatory reporting law, Ohio Rev. Code

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[4] Respondent uses the term "advisory opinion" to describe what the State sought from the Ohio Supreme Court (and seeks from this Court, *see* BIO 22-27) because the State has never offered any reason why the court of appeals' Rule 807 holding does not apply with equal force to L.P.'s statements to his teachers. *See* Cert. Reply 10. Nor could the State make any such argument. The court of appeals' holding (now law of the case) that the record lacks sufficient proof beyond L.P.'s statements that respondent committed the alleged abuse applies identically to all of L.P.'s statements. And it is hard to see how L.P.'s statements to his teachers could have particularized guarantees of trustworthiness if those to his grandmother and great aunt did not. Accordingly, there can be no doubt that if the Ohio Supreme Court had held (or if this Court were to hold) that L.P.'s statements to his teachers were nontestimonial, then the Ohio Court of Appeals on remand would require them to be excluded under Rule 807. The only reason the Ohio Court of Appeals did not issue such a holding in the first place is because it elected to consider first whether L.P.'s statements were testimonial and to turn to Rule 807 only if they were not, instead of first considering state law. *See* Pet. App. 55a, 63a-64a.

§ 2151.421, "'a necessary and appropriate'" element of protecting children is the "prosecution for criminal acts of child abuse." Pet. App. 8a (quoting *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861 at ¶25 (Ohio 2004)) (emphasis removed). Thus, while teachers are usually motivated by purely private concerns when questioning students, a teacher acts "as an agent of the state for law enforcement purposes" "when questioning a child *about suspected abuse in furtherance of a duty pursuant to [the mandatory reporter statute].*" *Id.* 15a (emphasis added). The teachers here "immediately suspected child abuse," "separated L.P from other students," and "sought facts" consistent with their training "in a formal question-and-answer format" concerning "who had perpetrated the abuse." *Id.* 16a. As a result, the Ohio Supreme Court held that "the nature and focus of the questions asked indicate a purpose to ascertain facts of potential criminal activity and identify the person or persons responsible." *Id.* 15a. The statements, therefore, were testimonial. *Id.* 16a.

Three Justices dissented. They argued that "[o]n the record before us, there is no basis from which to conclude that the injured child's teachers acted on behalf of law enforcement." Pet. App. 18a (O'Connor, C.J., dissenting). Instead, the dissent surmised that "the teachers questioned L.P about his injuries to protect L.P. and possibly other students from additional injury, and to maintain a secure and orderly classroom in which learning could take place." *Id.*

SUMMARY OF THE ARGUMENT

The Ohio Supreme Court correctly held that the statements L.P made to his teachers accusing respondent of abusing him were testimonial.

I. In cases dealing with police interrogations of adults, this Court has held that statements are testimonial if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006). The reason for this rule is straightforward: The Confrontation Clause gives defendants a right to confront their accusers, and if the prosecution introduces an accusation made under those circumstances at trial in lieu of live testimony, juries will view the accusation as a substitute for in-court testimony.

Neither the fact that the questioners here were teachers nor that the accuser was a child renders the primary purpose test inapplicable. Teachers can undertake to elicit accusations identifying perpetrators of crime, thus generating statements that juries would perceive as substitutes for live testimony. And children, just like adults, can make such accusations – realizing that they allege wrongful behavior – that function as perfect replacements for courtroom analogues.

II. The primary purpose test is satisfied here. As soon as the teachers saw L.P.'s facial bruising in the bright light of the classroom, they "immediately suspected child abuse." Pet. App. 16a. In this situation, the teachers had been trained to question the child to identify the abuser and to make an official report of the abuser's identity, so that social

services and law enforcement personnel could further investigate and decide whether to prosecute. Furthermore, state law guaranteed that any accusatory statements the teachers elicited would be admissible in any such prosecution. Ohio Rev. Code § 2151.421(H)(1). Accordingly, the teachers pulled L.P aside and asked L.P. – directly, repeatedly, and while seeking as much detail as they could – to identify who had abused him. L.P.'s response – "Dee did it" – was a perfect substitute for trial testimony. And that is exactly how the prosecution presented it to the jury.

III. The history and development of hearsay law confirms that introducing L.P.'s statements violated the Confrontation Clause. For centuries before and after the Founding, the general rule was that children's statements describing past abuse were inadmissible when the children did not testify. The only exception was for statements that qualified as excited utterances, thereby signaling that the participants in the exchange were "focuse[d] on something other than 'prov[ing] past events potentially relevant to later criminal prosecution'" and that the statement was "reliable because the declarant, in the excitement, presumably [could]not form a falsehood." *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 (2011).

Neither of those circumstances is present here. To the contrary, Ohio's special child hearsay law – enacted in 1991 – is designed to capture accusatory statements made at some remove from the crimes they allege. Children's extrajudicial accusations of abuse also are notoriously "unreliable." *Kennedy v. Louisiana*, 554 U.S. 407, 443 (2008). L.P.'s

statements here, in fact, are a case-in-point: They were given in response to ambiguous questions; immediately reinforced in a suggestive manner by the teachers; and never subjected to any probing as to whether it was really his mother – who, after all, already had an "extensive history" of child abuse and neglect, J.A. 96 – who had perpetrated the crimes against him and his sister. Ohio's child hearsay law, therefore, dispenses with cross-examination precisely where it is needed most.

IV The confrontation violation here is all the more intolerable because L.P.'s unavailability for cross-examination was a problem entirely of the State's own making. The law in many jurisdictions renders young children perfectly competent to testify, provided they can communicate with some minimal level of credibility. These jurisdictions also allow age-appropriate accommodations to facilitate such testimony. Yet Ohio presumes that all children younger than ten are *incompetent* to testify in any manner.

There is no need for any such rule. Worse yet, it is blatantly unfair. If out-of-court interviews with victims such as L.P. are reliable enough to be admissible and to sustain convictions, defendants should not be simultaneously prevented from having any opportunity whatsoever to question their accusers. This dramatic imbalance harks back to the infamous trial of Sir Walter Raleigh and is antithetical to our Constitution's adversarial system of justice.

ARGUMENT

I. The Primary Purpose Test Applies Here.

"[T]he principal evil at which the Confrontation Clause was directed was the use of *ex parte* examinations as evidence against the accused." *Crawford v. Washington*, 541 U.S. 36, 50 (2004). Indeed, extrajudicial accusations that a specific person committed a crime lie at the very core of the confrontation right. It thus would seem readily apparent that the Clause would presumptively apply to the out-of-court statement in this case accusing a specific individual – in response to structured questioning – of having perpetrated a crime.

The State, however, contends that the "primary purpose" test this Court has developed to implement the Confrontation Clause should not even apply here. Respondent thus begins by situating the primary purpose test within history and precedent. Respondent then explains why the "primary purpose" test must be applied to the facts of this case, just as it would to any other set of facts.

A. The Primary Purpose Test Protects The Integrity Of The Confrontation Clause's Requirement Of Live Testimony.

1. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. This provision expresses a rule of procedure. Namely, the prosecution must present its witnesses to testify in court, so that the jury can observe their demeanor and the defense can have an opportunity for cross-examination.

This procedure, of course, has a robust pedigree as a cornerstone of the adversarial process. The great expositors of the common law stressed the value of enabling the jury to "observ[e] the quality, age, education, understanding, behaviour, and inclinations of the witness." 3 William Blackstone, Commentaries on the Laws of England 373 (1768). "[T]he very Manner of a Witness's delivering his Testimony will give a probable Indication whether he speaks truly or fals[e]ly." Matthew Hale, The History and Analysis of the Common Law of England 257-58 (1713); *see also Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (the opportunity to evaluate a witness's "demeanor upon the stand and the manner in which he gives his testimony" helps to demonstrate "whether he is worthy of belief"). Cross-examination, for its part, has repeatedly been described as "the 'greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 1367 (3rd ed. 1940)); *accord, e.g.*, *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987).

This right of confrontation has always applied with special solicitude to witnesses who, as here, make direct accusations that a defendant engaged in criminal conduct. "The right to confront one's *accusers* is a concept that dates back to Roman times." *Crawford*, 541 U.S. at 43 (emphasis added). In the words of the Bible, the Romans believed it was unjust to condemn any man "before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." Book of Acts 25:16, *quoted in Coy v. Iowa*, 487 U.S. 1012,

1015-16 (1988). In the infamous English treason trials of the sixteenth and seventeenth centuries, the Crown deviated from this principle, introducing witnesses' out-of-court interrogations and letters in place of live testimony. This occasioned the cries of Sir Walter Raleigh – unheeded then, but later vindicated – that he was unable to confront his "accuser." *Crawford*, 541 U.S. at 44 (citation omitted).

In short, under the common law that the Framers inherited and incorporated in the Bill of Rights, the "direct and open participation" of the complaining witness "was indispensible." Leonard W. Levy, Origins of the Fifth Amendment 29 (1968). "Without the accuser there could not even be a prosecution." *Id.*

2. To safeguard this procedural right to confront adverse witnesses, the Confrontation Clause must prevent the prosecution from introducing certain out-of-court statements from nontestifying witnesses. As the Raleigh trial demonstrates, if the prosecution could introduce out-of-court statements that the jury would treat as the functional equivalent of testimony without putting the declarants on the stand, then the right to confront and cross-examine witnesses who do appear in court would be of little value. The state could choose which witnesses it wanted to bring into court, while shielding others from direct adversarial testing simply by procuring their out-of-court assertions *ex parte* and introducing them in lieu of live testimony at trial.

A twentieth century case further elucidates the point. In *Douglas v. Alabama*, 380 U.S. 415 (1965), a person named Loyd asserted during police

interrogation that Douglas had committed the assault and attempted murder at issue. At Douglas' trial, Loyd invoked his privilege against self-incrimination, so the prosecution introduced his extrajudicial statements in lieu of live testimony. This Court unanimously held that introducing these statements violated the Confrontation Clause. *Id.* at 419. Although Loyd's statements "were not technically testimony," their introduction "may well have been the equivalent in the jury's mind of testimony." *Id.* Such statements, the Court explained, cannot be introduced when there is an "inability to cross-examine" the declarant. *Id.*; *see also Green*, 399 U.S. at 179 (Harlan, J., concurring) (Confrontation Clause bars "trials by anonymous accusers, and absentee witnesses"); *Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) ("[A]n out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused.").[5]

3. *Crawford*'s "testimonial" framework implements this reasoning. Under *Crawford*, the Confrontation Clause prohibits the admission of nontestifying witnesses' out-of-court statements that

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[5] Contrary to the suggestion of amici Fern and Charles Nesson, this prohibition against submitting out-of-court accusations in lieu of live testimony applies to *all* prosecution witnesses, not just those necessary to establish a prima facie case. If the law were otherwise, the prosecution could put a single eyewitness on the stand and then present the rest of its case by affidavit. Transforming the Confrontation Clause into a mere "production requirement" would flout the Clause's text, history, and precedent.

– as this Court put it in *Douglas* – would function if introduced at trial as "the equivalent in the jury's mind of testimony," 380 U.S. at 419. In order for a pretrial statement to be subject to this risk, it need not literally be testimony. *Contra* Petr. Br. 15-16; U.S. Br. 21. People, for example, do not testify during stationhouse interrogations or when they write unsworn letters to prosecutors accusing someone of a criminal offense. But if the prosecution introduces such statements at trial, the functional kinship they share with in-court testimony will result in jurors taking the statements as a "*substitute* for live testimony" at trial, *Davis v. Washington*, 547 U.S. 813, 830 (2006) (emphasis added).

This is where the "primary purpose" test comes in. The question whether juries are likely to treat an out-of-court statement not as an ordinary piece of evidence but rather as a nontestifying witness's *testimony* turns on whether its primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. If so, then the statement has essentially the same function as in-court testimony and, therefore, is testimonial. *Id.* If not, then the object of the Confrontation Clause is not implicated and the statement's admissibility depends solely on the rules of evidence.

This Court's Justices, of course, recently have disagreed over the parameters of the "primary purpose" test. *Compare Williams v. Illinois*, 132 S. Ct. 2221, 2242-44 (2012) (plurality opinion), *with id.* at 2272-77 (Kagan, J., dissenting). But all agree that the test applies to "conventional witnesses" – that is, to those, as here, "who perceived an event that gave

rise to a personal belief in some aspect of the defendant's guilt." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 330-31, 344 (2009) (Kennedy, J., dissenting).

And this Court's decision in *Davis*' companion case, *Hammon v. Indiana*, demonstrates broad core agreement over when the test is satisfied. In *Hammon*, an eight-Justice majority held that out-of-court statements a woman made describing spousal abuse to a questioning police officer had the primary purpose of establishing past events potentially relevant to a later criminal prosecution. *Davis*, 547 U.S. at 829-31. "Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination." *Id.* at 830. They "deliberately recount[], in response to [official] questioning, how potentially criminal past events began and progressed" and who allegedly perpetrated the wrongful acts. *Id.* Hence, whatever else the Confrontation Clause may cover, statements "accusing a targeted individual of engaging in criminal conduct" are generally testimonial. *Williams*, 132 S. Ct. at 2242 (plurality opinion); *accord id.* at 2251 (Breyer, J., concurring).

This general rule, of course, is not absolute. In *Davis*, this Court held that a caller's "frantic answers" to a 911 operator, describing her assailant as events were unfolding, were not testimonial. 547 U.S. at 827. But that was because the primary purpose of the call was "to enable police assistance to meet an ongoing emergency." *Id.* at 827-28. "No 'witness,'" this Court explained, "goes into court to proclaim an emergency and seek help." *Id.* at 828.

So there was no danger that the jury would treat the caller's statements as her testimony. Similarly, this Court held in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), that a gunshot victim's identification of his shooter – an armed and dangerous killer who was "on the loose" and thus posed an imminent threat to public safety – was not testimonial because it was made "to enable police assistance to meet an ongoing emergency." *Id.* at 1159, 1167.

At the same time, *Davis* and *Bryant* emphasized that their holdings were exceptions to the rule. Out-of-court accusations to investigators "[a]re testimonial" so long as they "[a]re neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation." *Id.* at 1155 (quoting *Davis*, 547 U.S. at 832).

B. The Primary Purpose Test Applies To *All* Statements Designed To Aid Criminal Investigations, Not Just To Those Made By Adults To Police Officers.

The State contends that the primary purpose test "does not apply" here because the questioners were "private parties," not police officers, and the declarant was a child deemed incompetent under state law. Petr. Br. 10-11. As the United States recognizes, however, neither of these factors categorically exempts out-of-court statements from the primary purpose inquiry. U.S. Br. 12, 26-29.

1. The primary purpose test applies to statements elicited by teachers and other non-law enforcement personnel. This conclusion flows from history, precedent, and common sense.

Police involvement has never been the touchstone of the Confrontation Clause. What mattered historically when assessing whether an extrajudicial statement was testimonial was whether the questioner, if there was one, was "perform[ing] the *investigative functions* now primarily associated with the police." *Crawford*, 541 U.S. at 53 (emphasis added). In sixteenth and seventeenth century England, justices of the peace, who conducted examinations under the Marian statutes, often performed this function. *Id.* at 53. So those examinations were testimonial. In the contemporary case of *Hammon*, the declarant spoke to police officers. But what this Court emphasized was that the questioners were "perform[ing] investigative functions." *Davis*, 547 U.S. at 830 n.5; *see also id.* at 829 (statements were designed to aid "an investigation into possibly criminal past conduct"); *id.* at 830 (primary purpose of the interrogation "was to investigate a possible crime").

The reasons for this "investigative function" inquiry should be apparent. If a statement elicited to aid an investigation into possibly criminal conduct is presented to the jury in lieu of putting the witness on the stand, the jury will take it as the declarant's testimony. This is especially so if the statement accuses a specific individual of having committed the crime.

It does not matter whether the participants in the conversation spoke with the specific intent to create evidence for trial. "It is doubtful that the original purpose of the [Marian] examinations was to produce evidence admissible at trial." *Crawford*, 541 U.S. at 44. Rather, the critical point is that

statements made for investigative purposes are made to aid the official search for truth concerning suspected criminal events. That is precisely the function of testimony – and why juries view such out-of-court statements at trial as testimonial.

Non-law enforcement personnel, of course, do not "ordinarily" undertake to aid "the investigation and prosecution of crime." U.S. Br. 14. Family members and friends almost never engage in conversations for this purpose. And even the teachers in this case noted that they had called 696-KIDS to report child abuse only once in nine years before this incident. J.A. 37. But in the rare instances when a non-governmental questioner undertakes an investigative function or "a declarant uses a civilian solely as a conduit to communicate with the police," the primary purpose of the statement renders it just as testimonial as a statement made directly to law enforcement investigators. U.S. Br. 13; *see also People v. Stechly*, 870 N.E.2d 333, 365 (Ill. 2007) (holding that statements alleging abuse that a school social worker elicited, in his role as a mandatory reporter, from a kindergartner "to pass on to the authorities" were testimonial).

The State, in fact, implicitly concedes as much, acknowledging that statements objectively meant to be passed on to the police to aid an investigation might be testimonial. Petr. Br. 45-46. This concession is wise: a jury certainly would not treat a statement in response to a "private party's" structured questioning designed to discover the perpetrator of a crime any differently from one elicited directly by investigating officers.

And crediting this reality would not create any schism between the Confrontation Clause and the reach of "[o]ther constitutional provisions," Petr. Br. 41. The exclusionary rules this Court has created to enforce the Fourth Amendment, the requirement to give *Miranda* warnings, and the right not to be questioned without counsel present are all designed to regulate police conduct and to deter improper tactics. "The Confrontation Clause," by contrast, "in no way governs police conduct." *Davis*, 547 U.S. at 832 n.6. "[I]t is the *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision." *Id.* Accordingly, there is no need for state action to be present in the field in order to trigger the Confrontation Clause. All that is necessary is that the prosecution seek at trial to use a declarant's out-of-court statements generated primarily for investigatory reasons in lieu of live testimony. If the prosecution does so, the Confrontation Clause's core prohibition against trial by out-of-court accusation is implicated, thus necessitating judicial intervention.

2. Nor is there any basis for rendering the primary purpose test categorically inapplicable when the declarant is a young child. To the contrary, this Court has already made clear that "[o]ut-of-court statements made by children regarding abuse" fall within the ambit of the Confrontation Clause. *Idaho v. Wright*, 497 U.S. 805, 818 (1990).

It makes no difference if state law deems the child incompetent to testify. In *Wright*, the child declarant was two-and-one-half and incompetent under Idaho law. 497 U.S. at 808-09. Yet this Court held that the introduction of statements she made to

a doctor describing abuse violated the Confrontation Clause. *Id.* at 825-27. In *White v. Illinois*, 502 U.S. 346 (1992), this Court likewise applied the Confrontation Clause to a four-year-old's statements without any suggestion that the child's age categorically excluded his statements from the Clause's reach. *Id.* at 349, 355-58. *Crawford* confirmed that the Clause applies to young children, describing statements that the child in *White* made to the police as "testimonial." 541 U.S. at 58 n.8.

To be sure, a child's age is part of "all of the relevant circumstances" that courts must take into account within the primary purpose analysis. *Bryant*, 131 S. Ct. at 1162. Courts cannot "reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances." *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2405 (2011). Yet such adjustments must be made in both directions. While young children lack a sophisticated understanding of our criminal justice system, they perceive certain authority figures much the same way adults perceive the police – as official actors who have the power to punish wrongdoers. Therefore, at least where, as here, the child demonstrated an ability before trial to understand and respond to requests to describe wrongful behavior, a child's age cannot exempt the statements from confrontation scrutiny.

No other rule would make sense. The Confrontation Clause provides that "[i]n *all* criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him[.]" U.S. Const. amend. VI (emphasis added). There is no

exception allowing *child abuse prosecutions* to proceed by *ex parte* interview or affidavit. Nor is there any such exception for any other kind of prosecution in which a victim or critical eyewitness might be a young child. *See, e.g.*, *State v. Siler*, 876 N.E.2d 534 (Ohio 2007) (three-year-old eyewitness to murder). If anything, the potential defectiveness of children's perceptions and narratives make confrontation in this context all the more critical. *See infra* at 43-44.[6]

II. The Primary Purpose Of The Dialogue Between L.P. And His Teachers Was To Ascertain Facts For An Investigation Into Apparently Criminal Past Conduct.

The primary purpose test requires an objective evaluation of "the purpose that reasonable participants [in the dialogue at issue] would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Michigan v. Bryant*, 131 S. Ct.

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[6] In light of Ohio's prerequisite to introducing a child's out-of-court accusation of abuse that the accusation evince "particularized guarantees of trustworthiness" such that "cross-examination would add little to the reliability of the statement," Ohio R. Evid. 807(A)(1), this Court need not consider here whether statements from children too young even to understand and answer questions may be deemed testimonial. *See* Richard D. Friedman and Stephen J. Ceci, *The Child Quasi-Witness*, http://www-personal.umich.edu/~rdfrdman/quasi.chicago.pdf (forthcoming U. Chi. L. Rev.). It is impossible to imagine a child's statement satisfying Rule 807 without the child being able to communicate sufficiently to be a "witness" under the Confrontation Clause.

1143, 1156 (2011). Applying that test here, the Ohio Supreme Court held that L.P.'s statements to his teachers were testimonial because "the nature and focus of the questions asked indicate a purpose to ascertain facts of potential criminal activity and identify the person or persons responsible." Pet. App. 15a.

The State takes issue with this fact-intensive determination. Petr. Br. 46-55. But the perspectives of the teachers and L.P., as well as the circumstances in which their dialogue occurred, demonstrate that the primary purpose of the dialogue was to ascertain facts for an investigation into apparently criminal past conduct.

A. The Teachers' Perspective

1. The Ohio Supreme Court accurately determined that the teachers' primary purpose in questioning L.P "was not to extricate the child from an emergency situation or to obtain urgently needed medical attention, but rather [to undertake] an information seeking process to determine what had occurred in the past and who had perpetrated the abuse, establishing past events potentially relevant to later criminal prosecution." Pet. App. 16a.

This is so for several straightforward reasons. First, as soon as the teachers saw L.P. in the bright light of the classroom, they "immediately suspected child abuse." Pet. App. 16a. L.P. did not simply have a bump on his nose or a scrape on his arm; he had seemingly been struck repeatedly by "whips of some sort," J.A. 27; *see also* J.A. 43-44, 100 ("It was obvious when you looked at him" that he had been the victim of "child abuse."). Second, "[w]hen teachers suspect and investigate child abuse with a primary purpose

of identifying the perpetrator," Ohio law guarantees that any accusatory statements the teachers elicit will be passed on to law enforcement, Pet. App. 9a, and will be admissible in any prosecution, Ohio Rev. Code § 2151.421(H)(1). Third, the teachers here did, in fact, ask L.P – directly, repeatedly, and while seeking as much detail as they could – to identify who had abused him. J.A. 59-62.

2. The State takes issue with this analysis, contending that the teachers "questioned L.P. [i] to protect him and [ii] to secure the classroom – purposes that have nothing to do with investigating crime." Petr. Br. 50. Neither contention has merit.

a. The State's protective-purpose argument ignores this Court's precedent and the Ohio Supreme Court's reasoning. When assessing whether actions served an investigative or protective purpose, one cannot simply focus on their "ultimate goal." *Ferguson v. City of Charleston*, 532 U.S. 67, 82-83 (2001). Viewed in such terms, virtually all actions designed to elicit evidence of criminal conduct have the protective aim of preventing further harm. Rather, "[w]hat matters" is "the means by which [this protective purpose] was to be met." *Id.* at 83 n.20. Where the actions are meant to elicit incriminating evidence to "turn[] over to the police," *id.* at 86, then their "immediate objective" is "to generate evidence *for law enforcement purposes*," *id.* at 82-83.

This is what occurred here. The overall goal of Ohio's mandatory-reporter statute is "protecting children." Pet. App. 8a. But when children have been seriously injured, the "means" that Ohio law uses to accomplish that objective is the "prosecution for criminal acts of child abuse." Pet. App. 8a; *see*

also id. at 7a-8a ("[A] necessary and appropriate" means of protecting children is "identification and/or prosecution of the perpetrator in cooperation with law enforcement.") (quoting *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861, 865 (Ohio 2004)) (emphasis removed); Amicus Br. of Child Justice 6 ("[P]rotecting victims and potential victims of child abuse cannot be accomplished without the ability to see the process through to prosecution and conviction."). Thus, "when questioning a child about suspected abuse in furtherance of a duty pursuant to Ohio Rev. Code § 2151.421," teachers perform an investigative function tantamount to "law enforcement." Pet. App. 15a.

That is what the teachers were doing here. The teachers, like others in the state, had been "trained" to report child abuse to the Department of Child and Family Services (CFS). J.A. 37; *see also* Ohio Rev. Code § 2151.421(A)(1). They were also specifically instructed to report "who did this alleged abuse or neglect," J.A. 134, so that CFS could "notify law enforcement if the report involves a criminal offense against a child." Cuyahoga County Department of Children and Family Services Policy Statement, Standards for the Investigation of Intake Reports § H (effective May 24, 1996), *available at* http://cfs.cuyahogacounty.us/pdf_cfs/en-US/20300.pdf. The teachers' report of abuse, in fact, directly triggered an "investigat[ion]" that state law required CFS to conduct "in cooperation with the [local] law enforcement agency." Ohio Rev. Code § 2151.421(F)(1); *see also* J.A. 90, 103, 105, 126; Pet. App. 8a ("children services agencies shall investigate each report of known or suspected child abuse in cooperation with law enforcement") (quotation marks

and citation omitted). And state law explicitly provided that "[i]n a criminal proceeding, the report [was] admissible in evidence in accordance with the Rules of Evidence." Ohio Rev. Code § 2151.421(H)(1).

Lest there be any doubt concerning the teachers' primary purpose, official guidelines that Ohio disseminates to teachers underscore that L.P.'s teachers were engaged primarily in investigating an apparent crime. The guidelines instruct teachers generating reports of child abuse to procure and provide "as much information as [they] can," including "[w]hen and where the alleged abuse occurred," "[t]he circumstances surrounding the alleged abuse," and "[t]he identity and current whereabouts of the alleged perpetrator." Ohio Department of Job and Family Services, Office of Families and Children, *Child Abuse and Neglect: A Reference for Educators*, at 31 (2013), *available at* http://www.odjfs.state.oh.us/forms/file.asp?id=398&type=application/pdf. Any initial oral report "shall be followed up with a written report within five working days" and is a "confidential law enforcement record[]" *Id.* at 32. Finally, the guidelines place the teachers on notice that "the county prosecutor will determine if filing charges against the alleged perpetrator is appropriate," *id.* at 37.

In light of the practices and procedures that L.P.'s teachers followed here, it matters little that "[w]hen teachers question students about injuries," they are "rarely" seeking to aid law enforcement. Petr. Br. 50-51. There is no doubt that teachers address everyday bumps, scrapes, and disciplinary issues without any thought of law enforcement. But teachers, like police and others, "act with different

motives" at different times, *Bryant*, 131 S. Ct. at 1161; *see also* Pet. App. 3a, 15a. And this case involves one of the rare and deeply serious occasions in which teachers undertook to "investigate child abuse with a primary purpose of identifying the perpetrator." Pet. App. 9a.

b. The State's attempt to shoehorn this case into the "ongoing emergency" exception fares no better. Although teachers have a generalized obligation to keep a secure classroom "to protect [children] from harm at school," Petr. Br. 52, there is not the slightest suggestion in the record that L.P.'s teachers ever thought he had been harmed at school. The dramatic and serious nature of L.P.'s injuries – bruises across his face apparently inflicted by "whips of some sort," J.A. 27 – precluded any such supposition. It is doubtful any preschool-age child could have caused such injuries, and L.P. in any event would have wailed in pain when he received them. Yet the teachers never heard or observed such suffering. *See id.* 43-44.

That leaves the State's reliance on the fact that Teacher Jones asked L.P whether the perpetrator was "big or little." Petr. Br. 52. But Jones herself explained that she was only seeking to determine whether the abuser was "a brother or sister," as opposed to an adult. J.A. 60. This probing inquiry evinced, not erased, the teachers' investigatory purpose.

Nor is there any reason to believe the teachers' predominant goal was to "decide whether [L.P.] could be returned home at the end of the day." U.S. Br. 22-23. The teachers did not have any power to prevent Taheim or respondent from picking up L.P after

school. The only way for them to safeguard L.P from further abuse was to summon state authorities – which is exactly what they did.

Even when those authorities arrived, the situation bore no material difference from the one in *Hammon*, in which a police officer questioned a victim of domestic violence to determine in part whether she faced a continuing threat. *See Davis v. Washington*, 547 U.S. 813, 829-32 (2006); *id.* at 841 (Thomas, J., dissenting). This Court held in *Hammon* that notwithstanding that overall protective objective, the primary purpose of the questioning was to aid "an investigation into possibly criminal past conduct." *Id.* at 829. So too here.[7]

B. The Declarant's Perspective

L.P.'s actions within the broader context of his teachers' questioning show that a reasonable child in his situation would have grasped that the questioning was designed to elicit a consequential accusation of wrongdoing. Like the declarant in *Hammon*, L.P. was being pressed by authority figures to disclose who had perpetrated an assault that had inflicted visible physical injuries upon him. *See* J.A. 62 (Teacher Jones asked, "Who did this? Who did that to you?"). Like the declarant in *Hammon*, L.P

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[7] The United States also surmises that the teachers may have questioned L.P. "to determine whether L.P. had an urgent need for medical care." U.S. Br. 22. But the record belies this speculation as well. L.P. "made no complaints" about any pain, J.A. 44-45, and "he did not have any need for urgent medical care," Pet. App. 9a. Nor did the teachers ask him any questions designed to discern if he needed any kind of medical attention.

was being questioned "for the second time," 547 U.S. at 830, having initially said that nothing wrongful had happened but now facing fresh questioning that was obviously skeptical of the earlier explanation. *See* J.A. 32, 47, 50; *Davis*, 547 U.S. at 819-20. When L.P responded with an accusation, the authority figures reinforced the gravity of the accusation – as in *Hammon*, *see* 547 U.S. at 820 – by seeking confirmation of it. In Teacher Jones' words, she "repeated his words back," saying, "What did you say? Dee? Dee did this?" J.A. 60. And like the declarant in *Hammon*, L.P. provided such confirmation.

Of course, the declarant in *Hammon* responded to questions from a police officer, while L.P faced questioning from his teachers. But L.P.'s age must be taken into account in assessing his perception of authority. L.P.'s teachers (whom he had known only a couple of weeks, J.A. 28) were probably the most powerful authority figures he had ever encountered. After all, L.P was not old enough to dial 911 or to find his way to the local police station. His teachers were infused with public trust and had the authority to punish him and others. And L.P. would have viewed the teachers very differently from family members – as "official" authority figures, much like the declarant in *Hammon* (like any adult) would have viewed the police. These perceptions are more than enough to indicate his statements were testimonial.

C. The Circumstances Of Questioning

The circumstances under which the teachers questioned L.P. confirm that the primary purpose of the dialogue was to investigate potentially criminal

past events to aid law enforcement. Indeed, the State itself later portrayed the dialogue in just this way.

1. The "formality" of an exchange is a "factor" in the primary purpose calculus. *Bryant*, 131 S. Ct. at 1160. "[F]ormality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to 'establish or prove past events potentially relevant to later criminal prosecution.'" *Id.* (quoting *Davis*, 547 U.S. at 822). In *Hammon*, this Court found that the exchange between the declarant and the officer was "formal enough" to indicate "the statements' testimonial aspect" because the questioner "actively separated" the declarant from others before inquiring into what happened, and the declarant "deliberately recounted how potentially criminal past events began and progressed." 547 U.S. at 830.

Those same earmarks of formality are present here. Indeed, there are few circumstances that are more formal in the world of a child than focused and deliberate questioning from teachers, particularly when the child has been singled out and pulled aside from his classmates.

This Court's formality analysis in *Hammon* also relied on the fact that "lies to [police] officers are criminal offenses." 547 U.S. at 830 n.5. Similarly, here, the dialogue between the teachers and L.P. transpired under the shadow of the state's criminal apparatus. Not only is child abuse an extremely serious crime, but "a failure to report suspected child abuse is a criminal offense pursuant to [Ohio Rev. Code §] 2151.99(C), and [Ohio Rev. Code §] 2151.421(M) makes a mandated reporter 'liable for compensatory and exemplary damages to the child

who would have been the subject of the report that was not made.'" Pet. App. 8a. These laws alone do not make L.P.'s statements testimonial, but they – along with the state-law provisions expressly providing for mandatory reports to be reduced in writing for law enforcement and making them "admissible in evidence," Ohio Rev. Code § 2151.421(C) & (H)(1) – surely render the interaction the teachers initiated more formally investigative in nature.

2. Any lingering uncertainty as to whether L.P.'s statements were testimonial should be resolved by considering them against the backdrop of the overarching purpose of the Confrontation Clause: to prevent trial by *ex parte* accusations. *See Crawford v. Washington*, 541 U.S. 36, 50 (2004); *supra* at 22-25 (collecting pre-*Crawford* sources). That is exactly what happened here. The State charged respondent with child abuse. Yet the only "direct evidence" it presented at trial to prove that he, and not Taheim, perpetrated the abuse was the extrajudicial accusation that L.P.'s teachers and others elicited from him. Pet. App. 68a.

There can be no doubt that the jury treated L.P.'s accusation as the functional equivalent of testimony. At closing, the State expressly invited the jury to do so, explaining that "when this young three-year-old child with numerous injuries is asked, What happened to you? Who did this to you? He said, Dee." Tr. 685; *see also* Tr. 696. That is not the way a prosecutor presents "a casual remark to an acquaintance," *Crawford*, 541 U.S. at 51, or any other piece of nontestimonial hearsay. It is the way the government characterizes a witness's formalized

statement made to "accus[e] a targeted individual of engaging in criminal conduct." *Williams v. Illinois*, 132 S. Ct. 2221, 2242 (2012) (plurality opinion).

Respondent's trial thus resembled Sir Walter Raleigh's in every way that matters. The Framers rejected the specter of trials by *ex parte* accusation. This Court should not countenance one here.

III. The History And Development Of Hearsay Law Confirm That L.P.'s Statements Were Testimonial.

"In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will [also] be relevant." *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011). This is because traditional exceptions to the hearsay rule generally "rest on the belief that certain statements are, by their nature, made for a purpose other than use in a prosecution." *Id.* at 1157 n.9; *see also Crawford v. Washington*, 541 U.S. 36, 55-56 (2004) (noting that no hearsay exceptions at the time of the Founding allowed the admission of testimonial statements).

The State argues that hearsay law's historical treatment of accusatory statements such as L.P.'s indicates that the statements were nontestimonial. Petr. Br. 26-30, 32-35. But in fact, the evolution of hearsay law demonstrates the opposite.

1. The State first contends that hearsay law has customarily allowed the admission of "a victim's after-the-fact identification of the culprit to private actors." Petr. Br. 29 (emphasis removed). But all of the cases the State cites in support of this contention involved excited utterances – that is, statements that

were made, if not during the criminal acts themselves, at least "in natural consequence of the principal transaction." *State v. Murphy*. 17 A. 998, 999 (R.I. 1889). Hearsay law since at least the turn of the century has considered such statements "reliable because the declarant, in the excitement, presumably cannot form a falsehood." *Bryant*, 131 S. Ct. at 1157. And that excitement "focuses the participants on something other than 'prov[ing] events potentially relevant to later criminal prosecution.'" *Id.*; *see also id.* at 1157 n.9.

Ohio's child hearsay exception, Ohio R. Evid. 807, has no comparable historical pedigree. Washington enacted the country's first child hearsay law in 1982 (two years after *Roberts*)[8]; Ohio enacted its exception in 1991. Furthermore, these states (and others) enacted these exceptions even though child hearsay alleging abuse is notoriously "unreliable." *Kennedy v. Louisiana*, 554 U.S. 407, 443 (2008). Young children, for example, are "highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement." *Id.* Children, therefore, may make "induced, and even imagined" allegations of abuse, *id.*, and sometimes "modify their stories to fit what the adult questioner believes to have happened." Diana Younts, Note, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 Duke L. J. 691, 722 (1991).

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[8] *See* Wash. R. Evid. 802 (1982). This provision has since been amended and recodified at Wash. Rev. Code § 9A.44.120.

Studies have also shown that abusive parents sometimes "program" their children to blame some other specified person if ever asked to identify the abuser. William Bernet, *Practice Parameters for the Forensic Evaluation of Children and Adolescents Who May Have Been Physically or Sexually Abused*, 36:10 J. Am. Acad. Child Adolesc. Psychiatry, 37S, 44S, 50S (1997); *see also Maryland v. Craig*, 497 U.S. 836, 869 (1990) (Scalia, J., dissenting) (discussing the "value of the confrontation right in guarding against a child's distorted or coerced recollections"). This reality creates "a very real danger" that a jury will rely on the undeniable presence of a child's physical injuries "to mistakenly infer the trustworthiness of the entire statement," including "the child's allegations regarding the identity of the abuser." *Idaho v. Wright*, 497 U.S. 805, 824 (1990).

Worse yet, instead of identifying statements where the participants are likely to have been "focuse[d] on something other than 'prov[ing] events potentially relevant to later criminal prosecution," *Bryant*, 131 S. Ct. at 1157, Ohio's Rule 807 casts its net directly at statements "describing [physical or sexual abuse] directed against the child." Ohio R. Evid. 807(A). L.P.'s statements, therefore, do not fall within some generally applicable hearsay exception that might occasionally happen to cover accusatory statements. Rather, Rule 807 captures statements only insofar as they directly allege criminal conduct. This focus is at war with the Confrontation Clause.

To be sure, Rule 807 conditions the admissibility of allegations of abuse on trial-court findings that "the child was particularly likely to be telling the

truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement." Ohio R. Evid. 807(A)(1). Yet one need look no further than this case to see what an empty promise this is. When L.P.'s teacher first asked him "Who did this," J.A. 59, she also simultaneously asked "did he get a spanking?" *Id.* 79. L.P "looked uncertain" and "bewildered." *Id.* 59, 62. He responded "something like Dee, Dee," *id.* 59, but the teachers were "not sure if he understood the questions," *id.* 81. Instead of asking open-ended questions seeking clarification, however, the teacher followed-up with strongly suggestive reinforcement: "What did you say? Dee? Dee did this?" J.A. 60. L.P simply responded, "Dee." J.A. 60, 62.

The notion that cross-examination could have added little to the jury's assessment of the reliability of this exchange is hard to fathom. L.P may not have understood the questions he was asked, and it is unclear whether he was suggesting that Dee had spanked him or abused him in some other way. Indeed, Teacher Jones acknowledged that she never specified what she was asking about. J.A. 62. And even if L.P. had plainly asserted that Dee abused him, it is unclear whether he was talking only about his face or whether his allegation included the injuries later found on his chest and torso. Surely a defense lawyer on cross-examination would have wished to explore these ambiguities – not to mention whether it was really L.P.'s mother (a woman with an "extensive history" of abusing her other children, J.A. 96; *see also id.* 139, and who had previously been seen hitting L.P. with her purse strap, Tr. 670-71) – who actually perpetrated some or all of this abuse.

2. The State argues that, at the least, history supports the admission of child hearsay statements in lieu of live testimony when the children are deemed incompetent to testify. Petr. Br. 32-35. Once again, the historical record refutes, rather than supports, the State's claim.

For most of the eighteenth century, child hearsay was commonly introduced, but that was only because the practice at that time was also for children to testify in court. "Even if they could not be sworn, Hale asserted, the child should be heard unsworn." Petr. Br. 32 (citing 1 Matthew Hale, The History of the Pleas of the Crown 634 (E. Rider et al., eds. 1800)). And "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraint at all on the use of his prior testimonial statements." *Crawford*, 541 U.S. at 60 n.9.

Based on a handful of reports from the Old Bailey Sessions Papers, the State insists that child hearsay was sometimes introduced during this period without any in-court testimony. Petr. Br. 32-33. But even if this occurred once in a while, the most plausible explanation is that the defendants in those cases did not demand live testimony because – as the first edition of Blackstone's treatise explained – "infants of very tender years often give the clearest and truest testimony." 4 William Blackstone, Commentaries on the Laws of England 214 (1769); *cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328 (2009) (noting that defendants, for "strategic" reasons, sometimes allow prosecution to use out-of-court statements in lieu of live testimony). When defendants did demand live testimony, there is every indication it was required. As Blackstone put it at

the time: "[I]t is now settled, that infants of any age are to be heard" to allow "the court to hear the narration of the child herself, [rather] than to receive it at second hand from those who swear they heard her say so." 4 Blackstone, *supra*, at 214.

In *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), the King's Bench altered the rules governing child testimony. Young children, the court held, were incompetent to testify if they could not take the oath. *Id.* at 200. But this decision did not open the door to the introduction of child hearsay in lieu of in-court testimony. To the contrary, *Brasier* held that "the evidence of the information which the infant had given to her mother and the other witness, ought *not* to have been received." *Id.* (emphasis added). And Blackstone's Commentaries were promptly amended to note the "now settled" principle "that no hearsay evidence can be given of the declaration of a child who hath not capacity to be sworn." 4 William Blackstone, Commentaries on the Laws of England *214 (1783 ed.).

The prohibition against introducing prior statements by persons deemed incompetent to testify at trial predominated in America too. In *Le Baron v. Crombie*, 14 Mass. 234, 235 (1817), the court considered "whether the declarations of a witness under oath, competent at the time, but being incompetent by infamy at a subsequent trial, [were] legal and admissible." The answer was no, *id.*, for "[t]he admission of hearsay statements presuppose[d] that the assertor possessed the qualifications as a witness." 5 Wigmore on Evidence, § 1424 (emphasis removed); *see also* Kenneth S. Broun et al., McCormick on Evidence § 61 n.3 (6th ed.

2009) ("As a general proposition, competency standards apply to hearsay declarants as well as in-court witnesses. If a person would be incompetent to testify his hearsay statement is usually inadmissible."). This principle applied with full force to children. In *State v. Dominque*, 30 Mo. 585, 586 (1860), an eight-year-old boy found hurt in a field said "papa did it" and died two days later of his injuries. The statement was "inadmissible" against the defendant because it was neither connected to the criminal transaction nor a dying declaration. *Id.* at 586-67.

Not until the innovation of special child hearsay rules like Ohio's Rule 807 did states deviate from this time-tested rubric. *See* McCormick on Evidence § 61 n.3. The modernity and opportunism of this innovation undermine, rather than support, the State's position here.

IV. The States Have A Readily Available Solution To The Problem Of Child Testimony.

Child abuse is a terrible crime. Thus, if out-of-court accusations provided the only way to prosecute such transgressions, then the Ohio Supreme Court's holding might be cause for concern. But, in fact, law and practice in many other jurisdictions show that the historically preferred method of having children testify works in modern times too. That being so, permitting Ohio to engage in trial-by-ex-parte interview would be all the more intolerable.

A. The State's Own Law Needlessly Prevented It From Presenting Constitutionally Acceptable Testimony From L.P.

The State's amici warn that deeming children's extrajudicial accusations to investigators testimonial will "silence[]" children's voices. Br. of Ohio Pros. Att'ys Ass'n 2. But if any children are at risk of being silenced here, the culprit is not the Confrontation Clause, but rather Ohio's child competency provision, Ohio R. Evid. 601(A), which presumes that all children younger than ten are incapable of testifying. The State and its amici, in other words, are complaining here about a problem of the State's own making.

1. The law in numerous jurisdictions provides that young children can testify in child abuse cases – thereby obviating any constitutional problem with introducing their out-of-court statements. Federal Rule of Evidence 601, for instance, forbids any competency test for children, leaving instead a requirement only of "minimum credibility." Kenneth S. Broun et al., McCormick on Evidence § 62, at 310 (6th ed. 2009); *accord* 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 601.03 (2d ed. 1997). Under this rule, children may testify so long as their "powers of perception, recollection, [and] narration" are not "so deficient that it is not worth the time listening to [their] testimony." *Id.* Thirteen states follow the federal system, and many others have simply decreed children automatically competent to testify in child abuse prosecutions. *See supra* at 5 n.1.

Since the time of Hale and Blackstone, leading commentators have stressed that – no matter what a child's age – it is far better in child abuse cases to allow the jury "to hear the narration of the child herself, [rather] than to receive it at second hand from those who swear they heard her say so." 4 William Blackstone, Commentaries on the Laws of England 214 (1769). The jury can then take that testimony – along with any out-of-court statements – "for what it may seem to be worth." 2 Wigmore on Evidence § 509; *see also Hoffa v. United States*, 385 U.S. 293, 311 (1966) ("The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.").

To the extent states such as Ohio have deviated from this system, they have been sharply criticized. As the McCormick treatise explains, restrictive competency rules like Ohio's are grounded in a "distrust of a jury's ability to assess the words of a small child." McCormick on Evidence § 62, at 306. Yet there is no justification for such distrust. Jurors, like nearly all other people, regularly encounter young children and are well-equipped from their daily experience to evaluate their veracity. Consequently, "the remedy of excluding such a witness, who may be the only person knowing the facts, seems primitive and Draconian." *Id.*; *see also* Wigmore on Evidence § 509 (describing such laws as "unjust").

Worse yet, using pretrial competency hearings such as the one here, *see* J.A. 4-12, to try to assess the value of child testimony is "futile and

unprofitable," Wigmore on Evidence § 509 – or, as child psychologists put it, "clearly a waste of court time [while] d[oing] nothing to promote the search for the truth." Nicholas Bala et al., *The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform*, 18 Int'l J. of Children's Rights 53, 74 (2010). Children regularly become confused during colloquies asking them to demonstrate they know the difference between truth and lies, yet are fully capable of providing useful testimony. Thomas D. Lyon, *Assessing the Competency of Child Witnesses: Best Practice Informed by Psychology and Law, in Children's Testimony: A Handbook of Psychological Research and Forensic Practice* 69, 75-77 (Michael E. Lamb, et al. eds. 2011).

Of course, some children might be so young that they are truly incapable of perceiving events or meaningfully communicating – and thus might be unqualified to testify even under a properly flexible regime. But this Court need not concern itself with this possibility here. As noted above, Ohio's Rule 807 (like other special child hearsay laws) conditions the admissibility of out-of-court accusations on a finding that the statements bear "particularized guarantees of trustworthiness." It is impossible to imagine a child whose pretrial statement satisfies that test not being able to communicate with a minimum level of credibility at the time of trial. Thus, all respondent seeks is to preclude Ohio from having it both ways: pronouncing a child's ex parte, out-of-court accusation sufficiently reliable to prove a serious crime while simultaneously deeming the child incapable of providing useful testimony. In other words, all respondent seeks is what prosecutors and

child abuse experts themselves advocated before the *Roberts* framework took hold. *See supra* at 2-4 (discussing U.S. Dep't of Justice, *Attorney General's Task Force on Family Violence* ("*Task Force*") 39 (1984); Nat'l Legal Res. Ctr. for Child Advocacy & Prot., Am. Bar Ass'n, *Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases* 30 (1982)).

2. Perhaps the reason states like Ohio continue to cling to their *Roberts*-era procedures for prosecuting child abuse cases by way of "[t]estimony from mandatory reporters" is that the procedures "spare child victims from the trauma of testifying." Br. of Child Justice 33. The proper way to address this concern, however, is by adjusting the *methods* by which children testify subject to cross-examination, not preventing confrontation altogether.

This Court has already held, for example, that children, under certain circumstances, may testify from another room via live closed-circuit television. *Maryland v. Craig*, 497 U.S. 836, 857 (1990). Numerous other potential accommodations also exist to make it easier for children to testify in courtrooms. Federal law allows children to testify while supported by a nearby support person or independent counsel. 18 U.S.C. § 3509(b)(1)(D). Ohio and other states likewise permit judges to take measures, such as allowing children to hold "comfort items," "to ensure that a child testifies accurately and efficiently so as to minimize anxiety and trauma." Allie Phillips & Susanne Walters, *A Courtroom for All: Creating Child- and Adolescent-Fair Courtrooms*, National District Attorneys Association, National Child Protection Training Center, & Gundersen Health

System at 7, 16 (2013); *see also State v. Johnson*, 528 N.E.2d 567, 569 (Ohio Ct. App. 1986) (allowing child to testify while sitting on her aunt's lap).

When children would struggle even with accommodations to testify in court, courts might permit them to testify in age-appropriate settings such as child advocacy centers. The Attorney General's Task Force suggested in 1984, for instance, that "testimony could be videotaped in a therapeutic atmosphere," with questioning "done by an objective therapist in a relaxed setting with one-way mirrors." *Task Force* at 39. In order to "safeguard the rights of the accused," "[t]he person questioning the child could be fitted with an earpiece to allow questions from the prosecutor and the defense attorney to be presented in a nonthreatening manner." *Id.* Some states have implemented protocols along these lines, with the approval of appellate courts and commentators. *See, e.g.*, *State v. Melendez*, 661 P.2d 654, 656-67 (Ariz. Ct. App. 1982); Prudence Beidler Carr, *Playing by All the Rules: How to Define and Provide a "Prior Opportunity for Cross-Examination" in Child Sexual Abuse Cases After* Crawford v. Washington, 97 J. Crim. L. & Criminology 631, 654-64 (2007) (explaining why such protocols are consistent with *Crawford* and advocating them as the solution that best "balance[s] all of the competing interests at stake").[9]

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[9] As the title of this article suggests, if a child is interviewed in this manner substantially before the trial, the argument for the interview's admissibility in the absence of live testimony might be framed as a constitutionally adequate "prior opportunity to cross-examine," *Crawford*, 541 U.S. at 59, instead

There may come a point where such alternative processes deviate so dramatically from the model of in-court testimony that the Confrontation Clause comes into play. *See, e.g., Coronado v. State*, 351 S.W.3d 315 (Tex. Crim. App. 2011) (finding confrontation violation where defendant was permitted only to submit written interrogatories for child witness). But that would be a question regarding *what constitutes confrontation*, not whether confrontation is required. All respondent argues here is that defendants are entitled confrontation, whatever form it might take.

In other words, even videotaped confrontation in a child advocacy center would be immeasurably better that what occurred here. At the very least, the jury could then observe the demeanor of a child declarant, *see Craig*, 497 U.S. at 846, and evaluate the child's responses to the defendant's questions, gaining valuable insights even if the child does nothing more than profess "he cannot recall," *United States v. Owens*, 484 U.S. 554, 559 (1988); *see also California v. Green*, 399 U.S. 149, 159-60 (1970). That does not seem too much for a defendant to ask before being subjected to decades in prison.

3. The State's own actions here reinforce the reasonableness of respondent's position. After L.P.'s teachers elicited the accusations at issue, the State sent out its own experts – social workers and police officers – to conduct subsequent interviews with L.P

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of the declarant actually appearing at trial. Either way, the result would be the same. *See id.*

As social worker Bolog explained her reasons for re-interviewing L.P.:

> [W]e oftentimes get false allegations. So for me being an investigator, what I get from the hotline on paper, I don't just take it as the god's truth. I take it at face value. And although it might be written on paper or might have somebody tell me, until I'm able to prove it in my own mind or I'm able to see a connection, I tend to try to play a devil's advocate in my head or take things at face value.

J.A. 135. One would be hard pressed to offer a more cogent explanation of why cross-examination is so important – and why it was critical to test the veracity of L.P.'s accusation in this very case. In other child abuse cases, it is similarly customary – in deciding whether to prosecute – for police or prosecutors to arrange for child interview specialists to conduct interviews in age-appropriate settings. Nancy Chandler, *Child Advocacy Centers: Making a Difference One Child at a Time*, 28 Hamline J. Pub. L. & Pol'y 315, 330-32 (2006).

If law enforcement itself has concluded that it is important and worthwhile to carefully question young children regarding allegations of abuse, it hardly seems fair to deny defendants any semblance of the same opportunity. Nor is it sensible to deny the jury the information it might glean from viewing more balanced interviews. Insofar as the goal of the Confrontation Clause is to aid the search for truth, this should be an easy case.

B. Allowing States To Prosecute Child Abuse Cases By Way Of *Ex Parte* Accusations Such As Those Here Would Fatally Undermine The Adversarial System.

Allowing states to use school interviews in lieu of live testimony would not only undermine the truth-seeking goal of trial; it would provide a roadmap for states wishing systematically to evade the adversarial process in child abuse cases.

A recent bulletin from the Office of the Texas Attorney General provides a glimpse of what would come. Texas' special child hearsay statute allows only the first person to whom a child discloses abuse to repeat that extrajudicial accusation in court. *See* Tex. Crim. Pro. Art. 38.072 § 2(a)(3). Accordingly, the bulletin advises teachers that they "may have an especially important role to play in subsequent legal proceedings." Office of the Attorney General, *What Can We Do About Child Abuse?*, at 20 (Apr. 21, 2005), https://www.texasattorneygeneral.gov/ag_publications/pdfs/child_abuse.pdf. When teachers observe signs of child abuse, the bulletin continues, they should "[a]sk about what happened" and make a "secure and confidential" record for use "in a subsequent legal proceeding." *Id.* at 19-20. "[I]f you immediately pass the child on to another person such as a counselor or clergy-man, important testimony could be lost." *Id.* at 20.

The State's litigation strategy in this case indicates that it desires a similar system. After the Ohio Court of Appeals ruled that L.P.'s statements to the teachers, social workers, and police officer were testimonial, the State appealed that decision only with respect to the statement to the teachers. Pet.

App. 6a. The appeal will have no effect on the outcome of this particular case. *See supra* at 17 n.6. But apparently, the State is confident that if it can obtain an opinion from this Court exempting accusatory statements elicited by teachers from the Confrontation Clause, it will be able to prosecute child abuse cases in the future though out-of-court statements to teachers alone, without having to subject the alleged victims to any form of adversarial testing.

Where, as here, the State's evidence against the defendant is thin, such a procedure can make all the difference. As one of the State's amici puts it, "mandatory reporters have a better understanding [than children] of the legal system, can better withstand scrutiny on the stand, and are more likely to be believed by a jury." Br. of Child Justice 31. Their testimony thus helps "to ensure convictions," *id.* at 28, without subjecting a child's memory, comprehension of the questions previously asked, or credibility to scrutiny – that is, without providing the defendant with any opportunity of confrontation.

* * *

As hard as child abuse sometimes is to prove, it has been recognized for centuries that such a criminal charge is even "harder to be defended by the party accused, though innocent." 4 Blackstone, *supra*, at 215. Indeed, due to the "heinousness of the offence," there is a special danger that the jury may be "overhastily carried to the conviction" by false or inaccurate accusations. *Id.* For hundreds of years, the Anglo-American legal system has recognized that the best antidote to this danger is cross-examination – "the greatest legal engine ever invented for the

discovery of truth." 5 Wigmore on Evidence § 1367. This Court should turn away the State's request to systematically dispense with that protection where it is most needed.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

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APPENDIX

APPENDIX A

Ohio Rule of Evidence 601

General rule of competency

Every person is competent to be a witness except:

(A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

APPENDIX B

Ohio Rule of Evidence 807

Hearsay exceptions; child statements in abuse cases

(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid.R. 802 if all of the following apply:

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:

(1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.

(2) The court finds all of the following:

(a) the child is absent from the trial or hearing;

(b) the proponent of the statement has been unable to procure the child's attendance or testimony by process or other reasonable means despite a good faith effort to do so;

(c) it is probable that the proponent would be unable to procure the child's testimony or attendance if the trial or hearing were delayed for a reasonable time.

(3) The court finds both of the following:

(a) the child is unable to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity;

(b) the illness or infirmity would not improve sufficiently to permit the child to testify if the trial or hearing were delayed for a reasonable time.

The proponent of the statement has not established that the child's testimony or attendance is not reasonably obtainable if the child's refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the child from attending or testifying.

(C) The court shall make the findings required by this rule on the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling.

REPLY BRIEF

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Ohio's opening brief made three points. *First*, a child's statements that are objectively meant solely for private parties without police involvement are non-testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004). *Second*, Ohio's child-abuse reporting statute does not turn reporters into police "agents" and trigger the primary-purpose test governing police interrogations in the field. *Third*, even if the primary-purpose test applies, L.P.'s statements to his teachers were non-testimonial.

Clark's response on each point lacks merit. He argues for a contrary rule with no grounding in *Crawford* or its progeny. And he justifies his rule primarily with reliability and competency concerns more appropriately directed to state legislatures when drafting evidentiary rules than federal courts when interpreting the Confrontation Clause.

I. CLARK MISTAKENLY EXPANDS THE PRIMARY-PURPOSE TEST TO COVER ALL ACCUSATIONS

A. Clark's Argument That Accusations Are Testimonial Conflicts With *Crawford* And Its Progeny

As Ohio noted, Petr. Br. 14-30, the Confrontation Clause's text, purpose, and history show that, when *objectively* assessed, statements meant *solely* for private parties without *any* police involvement are non-testimonial. This rule follows from the Confrontation Clause's "witness" *text*—which covers statements meant for a criminal trial, not a private audience. The rule follows from the clause's *purpose* to bar the use of *ex parte* examinations by government officers. And it follows from the Nation's *history* of regulating private conversations under evidentiary, not consti-

tutional, rules. Here, L.P.'s statements to his teachers fall within this narrow rule because they were meant for daycare teachers, and the government had no involvement in the conversation.

In response, Clark asserts that Ohio mistakenly relies on a statement's *private audience*, suggesting instead that the focus should be on the statement's *accusatorial content*. Specifically, Clark argues that the Confrontation Clause bars "out-of-court statements that would function if introduced at trial as 'the equivalent in the jury's mind of testimony.'" Resp. Br. 25-26 (quoting *Douglas v. Alabama*, 380 U.S. 415, 419 (1965)). Under this rule, he says, "statements 'accusing a targeted individual of engaging in criminal conduct' are generally testimonial." *Id.* at 27 (quoting *Williams v. Illinois*, 132 S. Ct. 2221, 2242 (2012) (plurality op.)). But the same text, purpose, and history that prove Ohio's approach equally disprove Clark's competing view.

1. Clark's test conflicts with the Confrontation Clause's text

The clause's "witness" text shows that Clark is wrong *both* to focus on the jury's perspective *and* to place dispositive weight on the statement's content.

a. Clark's *jury*-focused test conflicts with the Court's *declarant*-focused test. Whether a declarant is a "witness" turns on the declarant's perspective because the declarant's statements must "pass the Sixth Amendment test." *Michigan v. Bryant*, 131 S. Ct. 1143, 1162 (2011). While a *questioner's* perspective helps "assess the nature of the declarant's purpose," *id.* at 1160 n.11, 1162, no post-*Crawford* case adds the *jury's* perspective to the mix. Indeed,

even under the primary-purpose test—which considers the *totality* of the circumstances—"[t]he existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight." *Id.* at 1157 n.8.

Douglas, the pre-*Crawford* case on which Clark relies, does not help him. Resp. Br. 25-26. There, the defendant and the declarant, Loyd, had been charged with assault. 380 U.S. at 416. At the defendant's trial, the prosecutor handed Loyd his confession and "read from the document, pausing after every few sentences to ask Loyd, in the presence of the jury, 'Did you make that statement?'" *Id.* Loyd invoked his right to remain silent each time. *Id.* The prosecutor did this "[u]nder the guise of cross-examination to refresh Loyd's recollection," never introducing the confession. *Id.* at 416-17. That the prosecutor's *questions* were at issue led the Court to say that his "reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement." *Id.* at 419. This language responded to the distinction between a prosecutor's questions and a witness's answers. *Lee v. Illinois*, 476 U.S. 530, 542 (1986) (noting the confession was "technically not evidence"). It did not distinguish testimonial from non-testimonial hearsay.

b. Clark incorrectly asserts that accusations "are generally testimonial." Resp. Br. 27. *First*, Clark's accusation test conflicts with the "witness" text. A witness speaks solemnly and "for the purpose of establishing or proving some fact at trial." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). An accusation does not satisfy this definition simply be-

cause it inculpates the defendant. Like any statement, it must be made to "creat[e] an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155. And just as the purpose of custodial police interrogation, objectively assessed, is evidentiary, the purpose of an accusation meant solely for private parties without police direction, objectively assessed, is non-evidentiary. "An accuser who makes a formal statement to government officers" acts as a witness; an accuser "who makes a casual remark to an acquaintance" does not. *Crawford*, 541 U.S. at 51.

Clark responds with language from *Davis v. Washington*, 547 U.S. 813 (2006), that statements are testimonial if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822; Resp. Br. 26. But *Davis* was discussing statements *to police* who were "perform[ing] investigative and testimonial functions." *Id.* at 830 n.5. It disclaimed any notion that its test governed "all conceivable statements," leaving open the proper test for private conversations. *Id.* at 822-23 & n.2.

Second, Clark's accusation test conflicts with cases distinguishing between statements to government officers and statements to private actors. Take *Crawford*'s treatment of the child's statements in *White v. Illinois*, 502 U.S. 346 (1992). While *Crawford* suggested the child's statements to *police* were testimonial, Resp. Br. 32, it expressed no concern about similar statements to the *mother*. 541 U.S. at 58 n.8; *White*, 502 U.S. at 349-50. The statement's audience, not its content, made the difference.

This is confirmed by comparing cases Clark cites (*Douglas* and *Hammon v. Indiana*) with cases he ig-

nores (*Giles v. California*, 554 U.S. 353 (2008), and *Dutton v. Evans*, 400 U.S. 74 (1970)). *Douglas* and *Hammon* found statements testimonial because they were to *police*. Loyd's confession after interrogation represented "exactly the type of formalized testimonial evidence that lies at the core of the Confrontation Clause's concern." *White*, 502 U.S. at 365 (Thomas, J., concurring in the judgment). *Hammon* found statements testimonial because they were made "in response to police questioning" about past crimes. *Davis*, 547 U.S. at 830.

Giles and *Dutton*, by contrast, show that private-party accusations are non-testimonial. *Giles* rejected the dissent's view that the Confrontation Clause's forfeiture exception should be interpreted broadly to help "women in abusive relationships." 554 U.S. at 376. In the process, it noted that "[s]tatements to friends and neighbors about abuse" are non-testimonial. *Id.* The *Dutton* statement—"[i]f it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now"—was as accusatorial as they come. 400 U.S. at 77 (plurality op.). Yet it was "clearly nontestimonial" because directed to a prisoner, not a cop. *Davis*, 547 U.S. at 825.

Third, Clark's accusation test conflicts with cases finding a statement's accusatorial nature irrelevant. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011). When rejecting the argument that "analysts are not subject to confrontation because they are not 'accusatory' witnesses," the Court found "no support in the text of the Sixth Amendment" for a distinction between accusations and other statements. *Melendez-Diaz*, 557 U.S. at 313. If the Confrontation

Clause does not exempt *non-accusatorial* testimony, it should not encompass *non-testimonial* accusations.

Fourth, Clark incorrectly claims support for his test in the *Williams* plurality and *Melendez-Diaz* dissent. Resp. Br. 26-27, 42-43. These opinions do view the Confrontation Clause as limited to statements "having the primary purpose of accusing a targeted individual of engaging in criminal conduct." *Williams*, 132 S. Ct. at 2242 (plurality op.). But Clark mistakes a *necessary* condition for a *sufficient* one. The opinions require statements to be both accusatorial *and* testimonial. *Id.*; *Melendez-Diaz*, 557 U.S. at 330 (Kennedy, J., dissenting).

2. Clark's test conflicts with the Confrontation Clause's purpose

Clark misreads the Confrontation Clause's purpose when he asserts that it was designed "to prevent trial by *ex parte* accusations," Resp. Br. 42, and that it reaches accusations made to private parties engaged in "investigations," *id.* at 29-30.

a. The Confrontation Clause was not designed to prohibit *ex parte accusations*; it was designed to prohibit *ex parte examinations*. *Crawford*, 541 U.S. at 50. Those examinations were conducted by government officials interviewing witnesses when investigating crime. This "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." *Crawford*, 541 U.S. at 56 n.7. Ordinary hearsay does not. Clark is thus wrong to accuse Ohio of seeking to "shield[]" witnesses "by procuring their out-of-court assertions." Resp. Br. 24. A rule limited to hearsay meant solely for private parties without

police direction would not shield from confrontation statements "procured" by the government. As Ohio noted, Petr. Br. 45-46, the Court can leave for another day situations where a declarant uses private parties as "conduits" for government actors or speaks with private parties at the government's behest.

No better is Clark's reliance on the *reasons* for the confrontation right—allowing the jury to assess the demeanor of witnesses and the defendant to cross-examine them. Resp. Br. 23. If these benefits triggered the right, the clause would cover *all* hearsay because confrontation is missed anytime the prosecution admits an out-of-court statement. *California v. Green*, 399 U.S. 149, 173 (1970) (Harlan, J., concurring). Tellingly, moreover, the treatises that Clark cites in support of these reasons show the confrontation right's intended scope. They contrast testimony *not* with garden-variety hearsay, but with *ex parte* examinations. 3 William Blackstone, *Commentaries on the Laws of England* 373 (1768); Matthew Hale, *The History and Analysis of the Common Law of England* 257-58 (1713). They thus confirm that the right exists to bar the use of *ex parte* examinations and their equivalents.

Clark also invokes Raleigh's trial. Resp. Br. 24, 43. "[T]he abuses there, however, went far beyond a conviction based on hearsay." *Green*, 399 U.S. at 178 n.11 (Harlan, J., concurring). They included a classic civil-law examination of Lord Cobham. *Williams*, 132 S. Ct. at 2249 (Breyer, J., concurring). Even the Cobham letter referenced by this Court was written for officials in the *midst* of trial. 9 William S. Holdsworth, A History of English Law 228 (1926). If anything, the only arguable analogy between this

case and that one appears in the history reports, not the U.S. Reports. In addition to Cobham's evidence, a man named Dyer testified that an out-of-court declarant accused Raleigh of planning to kill the king. 1 James F. Stephen, History of the Criminal Law of England 333 (1883). That the Court has never expressed any constitutional concern with this hearsay shows that it falls outside the Confrontation Clause.

b. Clark mistakenly uses the Confrontation Clause's purpose to conclude that it reaches statements to listeners engaged in "investigative functions." Resp. Br. 29-30. His proposal misreads *Crawford* and *Davis*. Those cases hold that the clause regulates statements to *police* because their "interrogations bear a striking resemblance to examinations by justices of the peace in England." *Crawford*, 541 U.S. at 52. "The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace." *Id.* at 53. This logic—that the government cannot evade the clause by changing its employees' job titles—does not extend to private conversations about past events.

Additionally, Clark's investigative-function proposal conflicts with the perspective that matters in the end. Whether or not a questioner has a prosecutorial motive, the declarant's purpose ultimately controls whether the declarant is a witness. *Bryant*, 131 S. Ct. at 1160 n.11, 1162. Even when a questioner cooperates with the government, a declarant's "statements made unwittingly to [that] Government informant" do not become testimonial merely because of the listener's investigative functions. *Davis*, 547 U.S. at 825 (discussing *Bourjaily v. United States*,

483 U.S. 171 (1987)). What sets yesterday's justices of the peace and today's police apart from everyone else is that declarants speaking to them objectively know their crime-fighting duties. The same cannot be said when declarants speak to secret sleuths who *objectively* have no criminal duties—whether or not they *subjectively* act to obtain criminal evidence.

Finally, Clark's proposal is unworkable. A test asking whether a questioner seeks "to aid the official search for truth" creates uncertainty in every case. Resp. Br. 30. Clark claims that "[f]amily members and friends almost never engage in conversations for this purpose," *id.*, but fails to explain why. In this case, for example, L.P.'s family might have had Clark's "investigative functions" when speaking to L.P. Tr. 431, 460. Under Clark's proposal, nobody could predict the admissibility of any declarant's answer to the question, "what happened?"

3. Clark's test conflicts with the Confrontation Clause's history

Clark's accusation test conflicts with the traditional way courts regulated accusations to private parties—through rules of evidence. One can cite "cases almost without limit" admitting a victim's after-the-fact accusation to private parties. *Solice v. State*, 193 P. 19, 22 (Ariz. 1920). Clark responds that these cases involve the *excited-utterance* exception rather than the *child-abuse* exception, a distinction that allegedly matters for historical and reliability reasons. Resp. Br. 43-46. Clark mistakenly details the history and reliability of child hearsay. *See* Part I.B. But, even assuming his account, these distinctions are without a difference.

History. While Clark claims the excited-utterance rule is old, Resp. Br. 44, "it is questionable whether testimonial statements would ever have been admissible on that ground in 1791," *Crawford*, 541 U.S. at 58 n.8. Rooted in the "res gesta" concept, the rule *expanded* to statements made after the described events. *Travellers' Ins. Co. of Chicago v. Mosley*, 75 U.S. 397, 408 (1869); 6 John H. Wigmore, *Evidence* § 1756, at 231 (J. Chadbourn rev. 1974). Clark cites no case raising the slightest constitutional concern with this expansion. That provides good evidence that private-party hearsay falls within "the Framers' design to afford the States flexibility in their development of hearsay law." *Crawford*, 541 U.S. at 68.

Clark retorts that it is the rule's *excitement element* (not its *private audience*) that removes these cases from the Confrontation Clause. Resp. Br. 44. He thus seeks to constitutionalize the excited-utterance rule. Courts would always have to ask whether a private-party accusation met *both* the evolving "excitement" element of state law *and* the rigid "excitement" element of the Confrontation Clause. *Hammon* shows what is in store for the States under his view. The state court admitted statements *to police* under Indiana's excited-utterance rule, but this Court found the statements testimonial. *Davis*, 547 U.S. at 821, 830-31. While the clause's concern with statements to *government investigators* necessitated this approach, Clark seeks to expand it to cover the usual situation where a declarant utters to neighbors, not investigators. This view that all excited-utterance rulings raise a fact-intensive constitutional question conflicts with *Crawford*'s effort to "delink the intricacies of hearsay law

from a constitutional mandate." *Bullcoming*, 131 S. Ct. at 2727 (Kennedy, J., dissenting).

Reliability. Clark argues that, unlike excited utterances, child hearsay is unreliable. Resp. Br. 43-44. This distinction "is little more than an invitation to return to [the Court's] overruled decision in" *Ohio v. Roberts*, 448 U.S. 56 (1980), which used reliability as the touchstone for admissibility. *Melendez-Diaz*, 557 U.S. at 317-18. Indeed, the report in *Melendez-Diaz* was likely *more* reliable than an excited utterance. *Cf. United States v. Boyce*, 742 F.3d 792, 799-800 (7th Cir. 2014) (Posner, J., concurring). Yet it was still excluded. If alleged reliability is not enough to *veto* the Confrontation Clause, then alleged unreliability should not be enough to *trigger* it.

Bryant, the case on which Clark relies, does not help him. When "making the primary purpose determination," the Court said, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." 131 S. Ct. at 1155. But it left open the proper test for statements to private actors. *Id.* at 1155 n.3. Those statements are nontestimonial without regard to reliability. *Bullcoming*, 131 S. Ct. at 2720 n.1 (Sotomayor, J., concurring) ("The rules of evidence, not the Confrontation Clause, are designed primarily to police reliability.").

B. Clark's Child-Hearsay Analysis Flips History On Its Head And Advocates For A Rule This Court Has Already Rejected

As Ohio noted, Petr. Br. 31-35, at a minimum, an *incompetent child's* statements to private parties are non-testimonial. Logically, the incompetency finding suggests that the child is incapable of making "tes-

timonial" statements. Historically, courts introduced hearsay from incompetent children. In response, Clark invokes history and logic to argue for the opposite rule—that a child's incompetency means courts must exclude the child's hearsay. He is twice wrong.

History. Clark agrees that "child hearsay was commonly introduced," Resp. Br. 47, but explains this fact on the ground that children were historically allowed to testify, *id.* at 1-3, 47-49. Not so. "It was at one time considered, that an infant, under the age of nine years could not be permitted to testify." *State v. Whittier*, 21 Me. 341, 347 (1842); *Commonwealth v. Hutchinson*, 10 Mass. 225, 225 (1813); *Rex v. Travers*, 93 Eng. Rep. 793, 794 (1726). This was the "sharply criticized" rule. Resp. Br. 51. Hale, for example, advocated for a *case-by-case* approach tied to each child's understanding. 1 Matthew Hale, *The History of the Pleas of the Crown* 634 (E. Rider et al., 1800). His view prevailed in *King v. Brasier*, 168 Eng. Rep. 202 (1779). And this case-by-case rule (the one Clark says "deviated" from history, Resp. Br. 51) was the law most everywhere until recently. *Wheeler v. United States*, 159 U.S. 523, 524-25 (1895); *Van Pelt v. Van Pelt*, 1810 WL 773, at *1 (N.J. 1810).

Clark relies on Blackstone for his contrary argument. Resp. Br. 1. But Blackstone cites only Hale's "private opinion" that children should testify *unsworn*. W. Williamson, *The Trials at Large of the Felons, in the Castle of York* 19 (York 1775). That view was always disputed. Hale's treatise was first published in 1736. Thomas D. Lyon and Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 Ind. L.J. 1029, 1034 (2007). Before then, a court rejected a child's testi-

mony without suggesting the child could speak unsworn. *Travers*, 93 Eng. Rep. at 794. And Hale's opinion was expressly repudiated forty years later. *King v. Powell*, 168 Eng. Rep. 157, 157-58 (1775).

It *was* settled, however, that private parties could testify about what children told them. Indeed, Hale opined that children should testify unsworn *precisely because* courts admitted their hearsay. 1 Hale, *Pleas* at 634. The trial judge in *Powell*, for example, stated that, "[w]ith regard to the admitting the declaration of the child to the mother, lord Hale speaks of that as a clear and settled thing." Williamson, *Trials at Large*, at 19. Thus, when judges found a child incompetent, they "were disposed to compensate by allowing the mother, a surgeon, or others" to testify about the child's statements. John H. Langbein, *The Origins of Adversary Criminal Trial* 239-40 (2003); Br. of Domestic Violence Legal Empowerment & Appeals Project, at 21-30.

Clark says *Brasier* changed things. Resp. Br. 48. But *Brasier* held only "that the infant would have been competent, and therefore that the extrajudicial evidence could not be used"; it said nothing about *incompetent* children. 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 1760, at 2271 (1904); *Travers*, 93 Eng. Rep. at 794 n.1; 1 Edward H. East, *A Treatise of the Pleas of the Crown* 444 (Philadelphia 1806). Ignoring all contrary authority, Clark cites Richard Burn's 1783 edition of Blackstone articulating a broader view of *Brasier*. Resp. Br. 48. But "Burn's source of information for the case is unknown." Lyon, 82 Ind. L. J. at 1053. And Clark cites no authority suggesting that Burn tied his idiosyncratic view to the confrontation right.

Clark's more modern authorities (McCormick and Wigmore) help Ohio. Resp. Br. 2, 48-49. The very footnote of McCormick that Clark cites for a rule excluding hearsay from incompetent parties adds: "However, in the past many jurisdictions have held excited utterances admissible even when declarant was a small child who would have been in competent [sic] to testify at trial." 1 Kenneth S. Broun, *McCormick on Evidence* § 61 n.3 (6th ed. 2006). Likewise, consistent with his view of *Brasier*, Wigmore recognized that "[w]here the prosecutrix is a child *too young to be a witness*, the statements should nevertheless be receivable." John Henry Wigmore, *A Supplement to A Treatise on the System of Evidence in Trials at Common Law* § 1761, at 170 (1908).

Logic. Clark suggests that an incompetency finding means the child's hearsay must be unreliable. Resp. Br. 6-7, 43-46. Yet at the height of the *Roberts* regime—when a statement's admissibility *turned* on its reliability—the Court rebuffed this logic. In *Idaho v. Wright*, 497 U.S. 805 (1990), it "reject[ed] [the defendant's] contention that [a child's] out-of-court statements [were] *per se* unreliable, or at least presumptively unreliable, on the ground that the trial court found the [child] incompetent." *Id.* at 824. *Wright* did so partially because, while the finding that a child could not communicate with the jury "might be relevant to whether the earlier hearsay statement possessed particularized guarantees of trustworthiness, a *per se* rule of exclusion would not only frustrate the truth-seeking purpose of the Confrontation Clause, but would also hinder States in their own 'enlightened development in the law of evidence.'" *Id.* at 825 (citation omitted). It would be

ironic if the Court adopted a reliability rule under *Crawford* that it rejected under *Roberts*.

Wright had good reason to reject Clark's proposal. Literature suggests that the competency inquiry at trial is a poor proxy for assessing whether the child's previous statements were reliable. *See* Victoria Talwar et al., *Children's Conceptual Knowledge of Lying and Its Relation to Their Actual Behaviors: Implications for Court Competence Examinations*, 26 Law & Hum. Behav. 395, 396, 411-12 (2002); Thomas D. Lyon & Karen J. Saywitz, *Young Maltreated Children's Competence to Take the Oath*, 3 Applied Dev. Sci. 16, 16-17 (1999). Indeed, one of Clark's *amici* rejects equating the two. Br. of Richard D. Friedman & Stephen J. Ceci, at 15-19.

II. Clark Improperly Treats Teachers As Police Merely Because Of A Reporting Duty

As Ohio showed (at 36-46), the teachers' reporting duty did not transform them into police "agents" or trigger the primary-purpose test. The duty imposes no requirement to investigate and does not make mandatory reporters analogous to police. Further, the duty would not transform private parties into "state actors" for purposes of related constitutional provisions. Clark's contrary arguments lack merit.

First, Clark blurs the distinction between a *reporting* duty and an *investigating* duty. He compares Ohio law to the hospital's drug-testing policy for pregnant women in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). Resp. Br. 35. Yet the hospital undertook that testing "for the specific purpose of incriminating those patients," not for a medical purpose. *Ferguson*, 532 U.S. at 85. *Ferguson* itself dis-

tinguished the hospital's *investigations* from a "duty to provide the police with evidence of criminal conduct that [reporters] inadvertently acquire in the course of routine treatment." *Id.* at 84-85 & n.24.

Second, Clark notes that a reporter's allegations may be given to police. Resp. Br. 35-36. He fails to explain why that matters. If it did, *anyone* who called 911 would be considered the "police" with respect to anything said to them before the call. In addition, Clark nowhere disputes that *everyone* historically had a duty to report crimes, Petr. Br. 38, and *everyone* now has a duty to report child abuse in many States, Pet. 24. Clark would turn all of these people into state agents. This case, moreover, is even further removed from police because reporters need only call social-service agencies, *O'Toole v. Denihan*, 889 N.E.2d 505, 513 (Ohio 2008), and the statute imposes an investigating duty on those agencies, not on police, Ohio Rev. Code § 2151.421(F)(1). That social-service entities investigate rebuts Clark's claim that prosecution is the primary "'means'" of protecting children. Resp. Br. 35. Such prosecution is merely an "adjunct" to the civil scheme. *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861, 866 (Ohio 2004).

Third, Clark suggests that administrative guidelines tell teachers to investigate abuse. Resp. Br. 37. Yet the guidelines instruct that "[i]t is not your responsibility to determine if abuse or neglect is in fact occurring or if any of the circumstances surrounding suspected incidents of abuse or neglect actually happened." ODJFS, Child Abuse and Neglect: A Reference for Educators, at 9 (2013), available at http://www.odjfs.state.oh.us/forms/file.asp?id=398&type=application/pdf. They instruct that, "since it is

the responsibility of the [social-service agency] to investigate alleged child abuse and neglect, school personnel shall not pressure the child to divulge information regarding specific circumstances or the identity of the alleged perpetrator." *Id.* at 32. And they instruct that handbooks "should be clear that your school does not investigate abuse and neglect, but the law enforcement and [social-service agency] do these investigations and your personnel cooperate whenever necessary." *Id.* at 46. Clark cites no evidence that the teachers here reviewed the guidelines, let alone shared his misunderstanding of them.

Fourth, Clark argues that Ohio Rev. Code § 2151.421(H) "guaranteed that any accusatory statements the teachers elicited would be admissible in any [criminal] prosecution." Resp. Br. 20; *id.* at 10-11, 35. But subsection (H) is an irrelevant *confidentiality* provision (as illustrated by this brief's appendix). It says "a report made under this section is confidential." Ohio Rev. Code § 2151.421(H)(1). It then lists exceptions to this confidentiality rule, including criminal prosecutions. *Id.* Yet a report is "admissible" in those prosecutions only "in accordance with the Rules of Evidence." *Id.* Clark's reliance on § 2151.421(H) is thus analogous to arguing that all statements to private parties are really statements to police because, like child-abuse reports, *all* are also "admissible in accordance with the rules of evidence." But a business record does not become a police report simply because it is admissible in accordance with Ohio Rule Evid. 803(6). The same is true of the reports at issue here.

Fifth, Clark fails to distinguish the related constitutional provisions that Ohio cited. He says the oth-

er provisions are irrelevant because they regulate "police conduct," whereas the Confrontation Clause "'in no way governs police conduct.'" Resp. Br. 31 (quoting *Davis*, 547 U.S. at 832 n.6). Yet *Davis* made this statement not for Clark's proposition (that statements to police are the same as statements to private actors), but for a far different one (that the clause does not prohibit police from procuring testimony). *Crawford* notes the obvious difference between statements to government actors and statements to private parties, 541 U.S. at 51, and the rules for distinguishing the two elsewhere are just as informative here.

III. Clark Has Not Shown That L.P.'s Statements Were Testimonial Under The Primary-Purpose Test

As Ohio showed (at 46-54), L.P.'s statements to his teachers were non-testimonial under the primary-purpose test. The teachers spoke with L.P. to protect him; L.P., given his young age, likely had no purpose at all when responding to his teachers; and the questioning was informal. Clark's contrary arguments are mistaken.

Teachers' Perspective. To claim that the teachers spoke with L.P for prosecutorial purposes, Clark relies on their reporting duty. Resp. Br. 34-38. Even if the Court agrees that the primary-purpose test applies, the reasons discussed above, *see* Part II, show that this duty does not establish that the teachers spoke with L.P. for evidentiary reasons.

Clark also notes that L.P. did not "simply have a bump on his nose" and had "seemingly been struck repeatedly by whips of some sort.'" Resp. Br. 34

(quoting JA27). These egregious injuries, Clark says, prove the teachers' prosecutorial purpose because they "'immediately suspected child abuse.'" *Id.* at 34 (quoting Pet. App. 16a). Quite the opposite is true. For starters, when asking questions like "Whoa, what happened," the teachers were "kind of like in shock." JA27. Most human beings, on encountering a severely injured three-year-old, would *spontaneously* ask the same questions without attempting to "creat[e] an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155.

In addition, "the dramatic and serious nature of L.P.'s injuries," Resp. Br. 38, had the "effect of focusing [the teachers'] attention on responding to the emergency," *Bryant*, 131 S. Ct. at 1157. When confronted with an injured child, teachers "need to know whom they are dealing with in order to assess the . possible danger to" the child. *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cnty.*, 542 U.S. 177, 186 (2004); *Davis*, 547 U.S. at 827. After all, L.P. himself "was not old enough to dial 911 or to find his way to the local police station." Resp. Br. 40.

L.P.'s Perspective. Clark argues that "[w]hile young children lack a sophisticated understanding of our criminal justice system, they perceive certain authority figures much the same way adults perceive the police—as official actors who have the power to punish wrongdoers." Resp. Br. 32; *id.* at 40. But Clark cites nothing for this bald conclusion. Here, no evidence suggests L.P. viewed his daycare teachers as people who would "punish" his abuser. More generally, studies suggest that, while children may view police as those who punish wrongdoers, they do not

view others in that light. Br. of Am. Prof'l Soc'y on the Abuse of Children, at 7-9 & nn.6-10.

Clark also claims that L.P would have recognized the gravity of the situation because the teachers questioned him like police would. Resp. Br. 39-40. But their conversation was brief, and the lead teacher did not want to embarrass L.P. or alarm the children in the classroom. JA58. Further, when L.P. implicated "Dee," she did not repeat L.P's words to reinforce "the gravity of the accusation." Resp. Br. 40. She did so because she "didn't know what that meant," JA59, and "just wanted to understand [L.P.] clearly," JA60. If anything, L.P.—given his youth and "bewildered" state, JA59—had "no purpose at all in answering questions posed; the answers [were] simply reflexive." *Bryant*, 131 S. Ct. at 1161.

Circumstances of Questioning. Clark claims that the "same earmarks of formality are present here" as were present in *Hammon*. Resp. Br. 41. That is a stretch. In *Hammon*, "[i]t import[ed] sufficient formality that lies to [police] officers are criminal offenses." *Davis*, 547 U.S. at 830 n.5. Here, no criminal law punished L.P. for lying to teachers. In *Hammon*, the victim's "interrogation was conducted in a separate room." *Id.* at 830. Here, L.P. was "in the classroom," and it was only later that a teacher took him to a separate room. JA45, 58. In *Hammon*, "after [the victim] answered the officer's questions, he had her execute an affidavit." *Davis*, 547 U.S. at 832. The teachers did not later draft an affidavit for L.P. to execute.

IV. The Proper Balance In Child-Abuse Cases Should Be Struck Through Democratic Means, Not Through An Atextual, Ahistorical Reading Of The Confrontation Clause

For centuries, child-abuse cases have presented difficult dilemmas. "In Cases of foul Facts done in Secret, where the Child is the Party injured, the repelling their Evidence entirely is, in some Measure, denying them the Protection of the Law." Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 293 (4th ed. London 1785). "[B]ut it must be remembered" that child abuse "is an accusation harder to be defended by the party accused, [though] never so innocent." 1 Hale, *Pleas* at 634. As the dueling *amicus* briefs show, the debate over the proper procedure for resolving these tragic cases is alive and well today.

Clark, for his part, claims to have discovered the solution to this centuries-old problem, and criticizes Ohio for not having adopted it. Resp. Br. 1-7, 49-59. Ohio (like many States) follows the case-by-case approach to determining a child's competency, *State v. Maxwell*, 9 N.E.3d 930, 957-58 (Ohio 2014), but allows courts to introduce child hearsay if it has "particularized guarantees of trustworthiness," Ohio R. Evid. 807(A)(1). Far better, Clark argues, for Ohio to eliminate competency requirements, Resp. Br. 3-5 & n.1, and protect children with techniques like examinations by therapists, *id.* at 4, 53-55. This proposal—one with little relevance to the Confrontation Clause—is ironic.

For one, it is the *defendant* who typically challenges a child's competency. *See, e.g.*, *Maxwell*, 9 N.E.3d at 957; *State v. Frazier*, 574 N.E.2d 483, 486-

87 (Ohio 1991). Statistics suggest that prosecutors rarely bring cases without the victim's testimony. Br. of Am. Prof'l Soc'y on the Abuse of Children, at 24. Here, prosecutors sought to prove L.P.'s competency. JA5-12. When they failed, Clark immediately moved to exclude L.P.'s remaining evidence. JA13.

For another, to justify his expansion of the confrontation right, Clark suggests the right could permit unique forms of child testimony. Resp. Br. 53-55. Yet, in other cases where States have opted for such approaches, defendants have been less forgiving than Clark about their validity. *Compare Maryland v. Craig*, 497 U.S. 836 (1990), *with Coy v. Iowa*, 487 U.S. 1012 (1988). Clark offers no basis to think that defendants would stop challenging these methods.

For a third, even in jurisdictions with more relaxed competency rules, Resp. Br. 3-5 & n.1, courts still exclude witnesses for lack of competency (for example, under the requirement that a witness have oath-taking capacity). *See* Fed. R. Evid. 603; Daniel J. Capra, *Case Law Divergence From the Federal Rules of Evidence*, 197 F.R.D. 531, 536 (2000); Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. Cal. L. Rev. 1017, 1021-24 (2000). The relaxed rules also provide no solution when the problem is the child's refusal to testify, *White*, 502 U.S. at 350, or the child's death, *United States v. DeLeon*, 678 F.3d 317, 327 (4th Cir. 2012), *rev'd on other grounds by* 133 S. Ct. 2850 (2013).

In short, Clark's proposal is not the panacea he claims. Worse still, by enshrining it in the Constitution, Clark "foreclose[s] [the States] from contributing to the formulation and enactment of rules that make trials fairer and more reliable." *Bullcoming*,

131 S. Ct. at 2727 (Kennedy, J., dissenting). It speaks volumes on the need for such democratic evolution that many *amicus* briefs are filled with psychological literature debating when children's statements are reliable. *Compare* Br. of Am. Prof'l Soc'y on the Abuse of Children, at 23-29, *with* Br. of Family Defense Ctr. et al., at 14-23. If ever there were an area where the Court should "afford the States flexibility in their development of hearsay law," *Crawford*, 541 U.S. at 68, this would be it.

One last word on Ohio's approach. The same brief that ridicules Ohio R. Evid. 807's reliability requirement as an "empty promise," Resp. Br. 46, criticizes Ohio for seeking an "advisory opinion" on the constitutional question because the intermediate court said that L.P.'s statements to his family should have been excluded under the rule, *id.* at 17. Clark's own brief suggests the rule is far from "empty." To be sure, Ohio believes that L.P.'s statements to his teachers fall within Ohio R. Evid. 807. Unlike the suggestive questioning in *Wright*, 497 U.S. at 826, the teachers did not know Clark or even "what [L.P.] meant" when he implicated "Dee," JA59. And Clark was the only suspect L.P implicated to *six* different people. JA46, 59, 128, 146, Tr. 431, 460. Yet this reliability question is not for *this Court* under the Confrontation Clause. It is for the *state courts* under Ohio R. Evid. 807.

CONCLUSION

The Ohio Supreme Court's judgment should be reversed, and the case should be remanded for proceedings consistent with this Court's decision.

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APPENDIX

Ohio Revised Code § 2151.421(H).

(H)

(1) Except as provided in divisions (H)(4) and (N) of this section, a report made under this section is confidential. The information provided in a report made pursuant to this section and the name of the person who made the report shall not be released for use, and shall not be used, as evidence in any civil action or proceeding brought against the person who made the report. Nothing in this division shall preclude the use of reports of other incidents of known or suspected abuse or neglect in a civil action or proceeding brought pursuant to division (M) of this section against a person who is alleged to have violated division (A)(1) of this section, provided that any information in a report that would identify the child who is the subject of the report or the maker of the report, if the maker of the report is not the defendant or an agent or employee of the defendant, has been redacted. In a criminal proceeding, the report is admissible in evidence in accordance with the Rules of Evidence and is subject to discovery in accordance with the Rules of Criminal Procedure.

(2) No person shall permit or encourage the unauthorized dissemination of the contents of any report made under this section.

(3) A person who knowingly makes or causes another person to make a false report under division (B) of this section that alleges that any person has committed an act or omission that resulted in a child being an abused child or a neglected child is guilty of a violation of section 2921.14 of the Revised Code.

(4) If a report is made pursuant to division (A) or (B) of this section and the child who is the subject of the report dies for any reason at any time after the

report is made, but before the child attains eighteen years of age, the public children services agency or municipal or county peace officer to which the report was made or referred, on the request of the child fatality review board, shall submit a summary sheet of information providing a summary of the report to the review board of the county in which the deceased child resided at the time of death. On the request of the review board, the agency or peace officer may, at its discretion, make the report available to the review board. If the county served by the public children services agency is also served by a children's advocacy center and the report of alleged sexual abuse of a child or another type of abuse of a child is specified in the memorandum of understanding that creates the center as being within the center's jurisdiction, the agency or center shall perform the duties and functions specified in this division in accordance with the interagency agreement entered into under section 2151.428 of the Revised Code relative to that advocacy center.

(5) A public children services agency shall advise a person alleged to have inflicted abuse or neglect on a child who is the subject of a report made pursuant to this section, including a report alleging sexual abuse of a child or another type of abuse of a child referred to a children's advocacy center pursuant to an interagency agreement entered into under section 2151.428 of the Revised Code, in writing of the disposition of the investigation. The agency shall not provide to the person any information that identifies the person who made the report, statements of witnesses, or police or other investigative reports.

AMICUS CURIAE BRIEF

No. 13-1352

In the Supreme Court of the United States

STATE OF OHIO, PETITIONER

v.

DARIUS CLARK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DONALD B. VERRILLI, JR.
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QUESTIONS PRESENTED

1. Whether an individual's obligation to report suspected child abuse makes that individual an agent of law enforcement for purposes of the Confrontation Clause.

2. Whether a small child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause.

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In the Supreme Court of the United States

No. 13-1352

STATE OF OHIO, PETITIONER

v.

DARIUS CLARK

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether statements made by a child to an individual with a duty to report suspected child abuse to a children's services agency or police constitute "testimonial" statements, within the meaning of the Confrontation Clause as interpreted in *Crawford* v. *Washington*, 541 U.S. 36 (2004). That question has substantial implications for the conduct of federal criminal trials, particularly with respect to the District of Columbia, federal territories, and the military, where the United States prosecutes many cases involving child abuse. The United States accordingly has a significant interest in this case.

STATEMENT

An Ohio grand jury charged respondent with felonious assault, endangering children, and domestic

violence arising from the physical abuse of his girlfriend's small children, L.P. and A.T. Following a jury trial at which the prosecution introduced several out-of-court statements made by L.P., including statements to his day care teachers identifying respondent as his abuser, respondent was convicted and sentenced to 28 years in prison. Pet. App. 3a-5a. The Ohio court of appeals reversed, holding that the introduction of several of L.P 's out-of-court statements violated the Confrontation Clause, and it remanded the case for a new trial. *Id.* at 51a-73a. The Ohio Supreme Court affirmed, holding that the admission of L.P.'s statements to his day care teachers violated respondent's Confrontation Clause rights. *Id.* at 1a-48a.

1. On March 17, 2010, respondent, whose nickname is "Dee," dropped off L.P., the three-year-old son of his girlfriend, at the William Patrick Day Head Start Center in Cleveland, Ohio. Pet. App. 3a, 53a. One of the teachers, Ramona Whitley, noticed in the lunchroom that L.P.'s left eye appeared bloodshot or bloodstained. *Id.* at 3a. Whitley asked, "What happened?" J.A. 27. L.P responded that he "fell." Whitley asked how he fell and hurt his face, and L.P. again stated, "I fell down." *Ibid.*

When L.P. entered a classroom, the brighter light revealed additional injuries, specifically red welts on L.P.'s face as if he had been whipped. Pet. App. 4a. Whitley alerted the lead teacher, Debra Jones, who observed L.P.'s bloodshot or bloodstained eye and "redness" around his neck. J.A. 58. Jones asked L.P., "[w]ho did this?" and "[w]hat happened to you?" J.A. 59. According to Jones, L.P "seemed kind of bewildered" and "said something like Dee, Dee." *Ibid.*

Jones asked if Dee was "big or little," gesturing with her hands to indicate height. J.A. 60. L.P. eventually responded, "Dee is big." J.A. 64. Jones later testified that she "asked him was he big or little, because I wanted to know was he talking about another child, because sometimes they'll say a brother or sister hit him." J.A. 60; see J.A. 64 (indicating that Jones did not know if "Dee" was a child or a "grownup").

Jones took L.P. to the office of her supervisor, Ms. Cooper, where Jones asked L.P. additional questions to understand the cause of L.P.'s injuries. Cooper raised L.P.'s shirt and observed red marks on his body. J.A. 65. At this point, Cooper determined that they "saw enough to make the call" and directed Whitley, who was the first to observe L.P.'s injuries, to contact the county's social service agency (the Cuyahoga County Department of Child and Family Services) by calling "696-KIDS." J.A. 65-66. That same day, a county social worker arrived at the school and interviewed L.P Shortly thereafter, respondent arrived, denied responsibility for L.P.'s injuries, and, over the social worker's objections, took L.P away. Pet. App. 4a; J.A. 149-152.

The next day, a second social worker located L.P. and his younger sister, A.T., at respondent's mother's house. J.A. 92-100. The social worker confirmed L.P.'s injuries and discovered additional evidence of abuse and neglect of L.P., as well as serious injuries, including burns and bruises, on A.T. J.A. 100-103. The social worker notified police, and an ambulance was called to transport the children to the hospital. J.A. 103-105. As the police and ambulance were arriving on the scene, the social worker asked L.P. questions to determine who caused the injuries, and L.P.

indicated that "Daddy" or "Dee" was responsible. J.A. 127-129. Later, a police detective showed L.P. a picture of respondent, and L.P. identified him as "Dee." J.A. 130.

At the hospital, the examining physician determined that L.P. had bruises and abrasions consistent with having been whipped with a belt. A.T. had bruising, burn marks, a swollen hand, and a pattern of sores at her hairline consistent with braids being ripped off her head. Pet. App. 4a-5a, 53a.

2. A grand jury charged respondent with five counts of felonious assault (one relating to L.P and four relating to A.T.), two counts of endangering children, and two counts of domestic violence. Pet. App. 5a. Before trial, the trial court examined L.P. and concluded that he was incompetent to testify because of his young age and his demeanor during the examination. J.A. 12; see also Ohio Evid. R. 601(A). Respondent then sought to exclude L.P.'s out-of-court statements identifying him as the abuser, arguing that their admission would violate his Confrontation Clause rights. J.A. 13. The trial court denied respondent's motion, finding that L.P.'s statements to the day care teachers and the other witnesses satisfied Ohio Rule of Evidence 807, which lifts the hearsay bar for a child's reliable statements concerning physical acts of violence against the child, and holding that admission of the statements would not violate the Confrontation Clause as construed in *Crawford* v. *Washington*, 541 U.S. 36 (2004). J.A. 20-22.

At trial, Whitley and Jones testified to L.P.'s statements at the day care. J.A. 25-86. In addition, the two social workers, a police officer who interviewed L.P. at the hospital, and two of L.P.'s family

members testified that L.P made out-of-court statements identifying his abuser as "Dee." Pet. App. 5a. The jury found respondent guilty on all charges except one felonious assault count relating to A.T. *Ibid.* The trial court sentenced respondent to 28 years of imprisonment. *Ibid.*

3. On appeal, the Ohio court of appeals reversed respondent's convictions and remanded the case for a new trial. Pet. App. 51a-73a. The court held that the testimony of five witnesses—the two teachers, the two social workers, and the police officer—about L.P.'s out-of-court statements violated the Confrontation Clause. *Id.* at 55a-63a. Focusing on the teachers specifically, the court "conclude[d] that L.P's statements to Whitley and Jones were testimonial" and subject to exclusion because "the primary purpose of Jones and Whitley questioning L.P. was to report potential child abuse to law enforcement." *Id.* at 63a. The court cited testimony from the teachers acknowledging their obligation under state law to report suspected child abuse.[1] *Ibid.*

4. The State appealed to the Ohio Supreme Court on whether the admission of L.P.'s out-of-court statements to the day care teachers violated respondent's Confrontation Clause rights.[2] A divided Ohio Supreme Court affirmed. Pet. App. 1a-48a.

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[1] The appellate court further held that L.P.'s out-of-court statements to his two family members were inadmissible under Ohio's hearsay rules. Pet. App. 66a-67a.

[2] The State did not appeal to the Ohio Supreme Court the appellate court's decision that the testimony from the social workers and the police officer violated the Confrontation Clause. Pet. App. 6a.

a. Because the day care teachers, Whitley and Jones, had a mandatory duty under Ohio law to report suspected child abuse to a children's services agency or to law enforcement, see Ohio Rev. Code. Ann. § 2151.421 (LexisNexis 2011); Pet. App. 6a-9a, the court held that a teacher in Ohio "acts * * * as both an instructor and as an agent of the state for law-enforcement purposes," in "questioning a child about suspected abuse." Pet. App. 15a. The court therefore applied a Confrontation Clause analysis that asked whether the primary purpose of the statements was to assist in addressing an ongoing emergency or to obtain emergency medical care, or, instead had the primary purpose of "establishing past events potentially relevant to later criminal prosecution." *Id.* at 15a-16a.

The court concluded that because "no ongoing emergency existed, nor had L.P. complained about his injuries or needed emergency medical care," Pet. App. 15a, the teachers had embarked on "an information-seeking process to determine what had occurred in the past and who had perpetrated the abuse," *id.* at 16a. According to the court, "the nature and focus of the [teachers'] questions" "indicate a purpose to ascertain facts of potential criminal activity and identify the person or persons responsible." *Id.* at 15a-16a. The court therefore held that L.P.'s responses were "testimonial" and barred by the Confrontation Clause. *Id.* at 16a.

b. Three justices dissented. Pet. App. 18a-47a. The dissent observed that in *Davis* v. *Washington*, 547 U.S. 813 (2006), and *Michigan* v. *Bryant*, 131 S. Ct. 1143 (2011), this Court addressed statements made during police interrogations and had reserved "whether and when statements made to someone

other than law enforcement personnel are 'testimonial.'" Pet. App. 24a (quoting *Davis*, 547 U.S. at 823 n.2). With respect to non-law-enforcement statements, the dissent noted, the Ohio courts have asked whether "an objective witness would reasonably believe that the questioning served primarily a prosecutorial purpose." *Id.* at 26a (citing *State* v. *Stahl*, 855 N.E. 2d 834, 844 (Ohio 2006)).

The dissent rejected the court's view that L.P.'s teachers functioned as agents of law enforcement. The dissent explained that Whitley and Jones were employed by a non-profit Head Start program and found "absolutely no indication that these teachers questioned L.P for law enforcement." Pet. App. 30a-31a. The dissent disagreed with the assertion that Ohio's mandatory-reporting law effectively "deputize[d] [the teachers] as agents of law enforcement," particularly since the statute "does not impose a duty to ask any questions about suspicious injuries or conditions or to undertake any investigation." *Id.* at 35a. In the dissent's view, a teacher's decision to ask about a student's bruise or black eye "stems not from the statutory duty to report child abuse or neglect," but "from a professional responsibility or concern for the child." *Id.* at 36a. Directing teachers to report suspicions of abuse, the dissent reasoned, "does not change the primary purpose of the[ir] * * * interaction with children." *Id.* at 35a.

The dissent concluded that, in this case, "Whitley and Jones questioned L.P. to protect him and to maintain a safe and structured classroom, not to create evidence for use at [respondent's] trial." Pet. App. 39a-40a. The dissent noted that the teachers' initial "informal and spontaneous" questioning occurred in a

classroom, alongside other students, and the teachers expressed concern that another student had caused L.P.'s injuries. *Id.* at 40a. As soon as L.P. indicated that "Dee" was "big," the dissent pointed out, the teachers stopped their questions, brought L.P. to a supervisor's office, and notified authorities. *Id.* at 41a. These actions, the dissent found, were done not for any prosecutorial purpose, but to "protect L.P. at that moment." *Id.* at 42a.

SUMMARY OF ARGUMENT

L.P.'s statements to his day care providers were not "testimonial" statements covered by the Confrontation Clause. Rather, those statements had the primary purpose of informing L.P's teachers about the source of L.P.'s injuries that the teachers observed at school. The statements of the three-year-old L.P. were not made with a primary purpose of aiding law enforcement or substituting for trial testimony.

I. The Ohio Supreme Court incorrectly categorized L.P.'s day care teachers as agents of law enforcement because of their duty to report suspected abuse or neglect to the county social service agency or to police. The teachers were far removed from any contact with police, and the mandatory reporting duty did not transform them into law enforcement agents for purposes of the Confrontation Clause. Unlike police, civilians, like the teachers here, do not have a professional duty to investigate crime; nor do they typically act with the primary purpose of gathering evidence for a criminal trial. A statement made to a civilian, without police participation, is therefore unlikely to fall within the Confrontation Clause's concern.

II. The Ohio Supreme Court made two errors in its Confrontation Clause analysis. First, by mischarac-

terizing the teachers as police agents, the Ohio Supreme Court ignored the teachers' obvious protective purpose in asking L.P. about the cause of his injuries. The Ohio Supreme Court dismissed the teachers' urgent need to determine whether L.P. would be endangered if released to respondent's custody at the end of the school day. That pressing purpose distinguishes a caregiver's inquiry into possible child abuse from police questioning of adult victims. The nontestimonial character of L.P.'s statements was further demonstrated by the classroom setting and the fluid and informal nature of the questions and answers.

Second, the Ohio Supreme Court omitted any evaluation of L.P's primary purpose, and by ignoring the declarant, the court failed to conduct a key component of the Confrontation Clause inquiry. In so doing, the court gave no consideration to the fact that L.P. was only three years old. A child declarant's age is an objective circumstance that is relevant, if not critical, to determining whether his statement is testimonial. Because a very young child in L.P.'s position would not have understood the future consequences of his statements to his day care teachers, much less have anticipated their use in a criminal proceeding, and because nothing in the questioning suggests a police effort to generate testimony, his statements should not be deemed testimonial.

ARGUMENT

THE CONFRONTATION CLAUSE PERMITS USE OF THE CHILD VICTIM'S STATEMENTS TO HIS DAY CARE TEACHERS IDENTIFYING HIS ABUSER

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted

with the witnesses against him." U.S. Const. Amend. VI. In *Crawford* v. *Washington*, 541 U.S. 36 (2004), this Court held that the Sixth Amendment generally forbids introduction of "testimonial" statements of an absent person at a criminal trial unless the person was unavailable to testify, and the defendant had a prior opportunity for cross-examination. *Id.* at 51, 53-54, 68.

The Ohio Supreme Court held the statements of a three-year-old victim of abuse, L.P., to his day care teachers were "testimonial" based on two erroneous propositions: first, that Ohio's mandatory reporting statute transformed the day care teachers into "agents of the state for law-enforcement purposes," because the law imposes a duty to report "actual or suspected child abuse or neglect" on teachers (among others); Pet. App. 6a, 15a-16a; Ohio Rev. Code Ann. § 2151.421 (LexisNexis 2011); and, second, that the purpose of the teachers' questions was to ferret out facts concerning criminal liability and the person responsible for it. The court was mistaken: the existence of a reporting duty did not make the day care teachers agents of law enforcement, and in light of all of the circumstances, L.P.'s statements were made primarily to address pressing and immediate health and welfare concerns, not to provide evidence for purposes of prosecution.

I. DAY CARE TEACHERS DO NOT ACT AS AGENTS OF LAW ENFORCEMENT BY VIRTUE OF A MANDATORY REPORTING STATUTE

A. The Confrontation Clause Generally Bars Hearsay From A Non-Testifying Person Whose Primary Purpose Was To Generate Testimony

This Court in *Crawford* did not comprehensively define the scope of "testimonial" statements, but it noted that the term applies "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations," which are "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." 541 U.S. at 68; see also *id.* at 51 (noting that "'[t]estimony,' is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact'") (second set of brackets in original) (quoting 2 Noah Webster, *An American Dictionary of the English Language* 91 (1828)). In cases since *Crawford*, this Court has generally addressed whether an out-of-court statement is "testimonial" by asking whether the "primary purpose" of the statement was to "create a record for trial." *Michigan* v. *Bryant*, 131 S. Ct. 1143, 1155 (2011); *Davis* v. *Washington*, 547 U.S. 813, 822 (2006).

In *Davis* and a consolidated case, *Hammon* v. *Indiana*, this Court considered whether statements to law enforcement—during a 911 call and at the scene of a domestic assault, respectively—were testimonial. The Court asked whether the statement's purpose was "to enable police assistance to meet an ongoing emergency," 547 U.S. at 822, as opposed to being a mere "substitute for live testimony," *id.* at 830, and it held that the 911 caller's report on immediate events was

non-testimonial, while the police-elicited statement about past conduct by a domestic-assault victim was testimonial, *id.* at 828-832.

Applying a primary-purpose analysis, *Bryant* held that a shooting victim's statements to police identifying his assailant were nontestimonial, because, among other reasons, they were made in response to questions during an ongoing emergency. 131 S. Ct. at 1162-1167. *Bryant* confirmed that the "primary purpose" of statements is determined by "objectively evaluat[ing] the circumstances in which the encounter occurs and the statements and actions of the parties," *id.* at 1156, including "the declarant and the interrogator," the "contents of both the questions and the answers," *id.* at 1160-1161, and other circumstances that would objectively reveal the purpose of the declaration, *id.* at 1156, 1161.

B. The Primary Purpose Test Applies To Statements Made To A Civilian, But Absent Police Participation, Such Statements Typically Will Not Raise Confrontation Clause Concerns

Crawford, *Bryant*, *Davis*, and *Hammon* each involved statements made in response to police questioning and therefore did not resolve "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Bryant*, 131 S. Ct. at 1155 n.3 (citation omitted); *Davis*, 547 U.S. at 823 n.2; *Crawford*, 541 U.S. at 38-40, 65-66. In analyzing statements to civilians, the primary-purpose test performs the same function in identifying statements that are intended to substitute for in-court testimony, and thus constitute "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (brackets in

original) (citation omitted). But the critical distinctions between a police interrogator and an interested civilian suggest that statements to non-law enforcement will typically be nontestimonial.

The Confrontation Clause "reflects an especially acute concern with a specific type of out-of-court statement": "a formal statement to government officers" with an "essentially investigative [or] prosecutorial function." *Crawford*, 541 U.S. at 51, 53. The Clause was a reaction to the use of *ex parte* examinations by magistrates under the Marian statutes, *id.* at 50, and the "unique potential for prosecutorial abuse" when "government officers" are involved in "the production of testimony with an eye toward trial," *id.* at 56 n.7. Although the Marian statutes exemplified the "principal evil" targeted by the Confrontation Clause, *id.* at 50, it is difficult to say that *all* statements to non-law enforcement personnel are automatically exempt from Confrontation Clause review. If a declarant uses a civilian solely as a conduit to communicate with the police, or the police enlist a civilian as a surrogate to generate witness statements primarily to further a criminal investigation, the Confrontation Clause may well apply. Cf. Pet. Br. 45-46 (noting that those contexts are not involved in this case).

But a teacher, doctor, nurse, day-care employee, or caregiver performing her ordinary role does not implicate any such concerns. A civilian, like the teachers here, with no connection to law enforcement, typically approaches an injured victim as a Samaritan seeking to assist, not as a Marian inquisitor, a police officer, or a prosecutor in pursuit of evidence. *Bryant*, 131 S. Ct. at 1155. Civilians will have a wide range of reasons for conversation and inquiry, and they are not charged

with a professional duty to gather evidence for criminal prosecutions. Nor would a victim mistake a civilian, like the day care teachers here, for law enforcement. Cf. *Crawford*, 541 U.S. at 58 (noting that *Bourjaily* v. *United States*, 483 U.S. 171, 173-174 (1987), "hew[ed] closely" to the testimonial line by admitting statements made "unwittingly" to an undercover informant, where the declarant was not made aware that the statement was being sought for use at trial).

By contrast, law enforcement officers have criminal investigation among their primary duties, such that statements made to police are often testimonial. See *Davis*, 547 U.S. at 831 n.5 (noting that "examining police officers * * * perform investigative and testimonial functions once performed by examining Marian magistrates") (citation omitted). Of course, the police have other functions as well, and statements elicited by the police in response to an emergency, as well as in other settings, may reflect paramount purposes other than gathering or preserving testimonial evidence. See *Bryant*, 131 S. Ct. at 1155 ("[T]here may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony."). But those "other circumstances" are the typical situation for a civilian whose primary role is not law enforcement.

The primary purpose test therefore accounts for the key distinctions between police, whose prime objective is typically the investigation and prosecution of crime, and others, who generally inquire for reasons unrelated to the prosecutorial process. Under that legal standard, the "primary purpose" of civilian inquiry is ordinarily not to generate evidence but to

serve other purposes, and the resulting statements to civilians will typically be nontestimonial.

C. The Ohio Mandatory Reporting Statute Does Not Transform Civilians Into State Actors

The Ohio mandatory reporting statute does not change the analysis.

1. The Ohio Supreme Court acknowledged that, as with other state mandatory child abuse reporting schemes, the "primary purpose" of Ohio's reporting duty is to "facilitate the protection of abused and neglected children, *rather than to punish those who maltreat* them," Pet. App. 7a-8a (emphasis added) (quoting *Yates* v. *Mansfield Bd. of Educ.*, 808 N.E. 2d. 861, 865 (Ohio 2004)).[3] That protective purpose is also demonstrated by the operation of the Ohio reporting statute, which provides that a report of abuse may be made *either* to a children services agency (as the day care teachers did here), *or* to a peace officer, and which assigns the social service agency, rather than police, primary investigation authority.[4] Ohio Rev.

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[3] See Amicus Curiae Pet. Stage Br. of Am. Prof'l Soc'y on the Abuse of Children 7-8 & n.4 (listing state reporting statutes and explaining that they emphasize "the need for child protection and rehabilitation of the family, rather than the potential prosecution and punishment of the abusers").

[4] Even if a report of suspected abuse or neglect were made to a peace officer, the statute directs that officer to "refer the report to the appropriate public children services agency," Ohio Rev. Code. Ann. § 2151.421(D)(1) (LexisNexis 2011). While the statute requires the social service agency to conduct its investigation in "cooperation with the law enforcement agency," *id.* § 2151.421(F)(1), the coordination is to be made with the "primary goals" of "the elimination of all unnecessary interviews of children" or "when feasible, providing for only one interview of a child," *id.*

Code Ann. § 2151.421(A)(1)(a) (LexisNexis 2011). The Ohio Supreme Court incorrectly concluded that, irrespective of those statutory priorities, mandatory reporters, such as the teachers here, necessarily serve in a "dual capacity": as an "instructor[]" and as an "agent of the state for purposes of law enforcement." Pet. App. 3a.

Significantly, the Ohio statute does not vest mandatory reporters with any duty (or authority) to investigate on behalf of the State. Rather it imposes only a limited duty to report observed facts giving rise to a suspicion of abuse or neglect. Ohio Rev. Code Ann. § 2151.421(F)(1) (LexisNexis 2011). Such a reporting duty does not convert a private party into an agent of the State.

2. The conclusion that day care teachers do not become agents of law enforcement by virtue of a reporting duty accords with this Court's analysis of state action in other contexts. In no other constitutional context has such a limited reporting duty transformed a private party into an agent of law enforcement.

In the Fourth Amendment context, for example, this Court has distinguished between reporting duties and an affirmative obligation to conduct an investigation on behalf of police. In *Ferguson* v. *City of Charleston*, 532 U.S. 67 (2001), this Court contrasted a state hospital employee's "duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment"—which does not implicate Fourth Amendment concerns—with those employees' active efforts "to obtain such evidence from their patients for the specific pur-

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§ 2151(J)(2); rather than with the specific goal of facilitating criminal prosecutions.

pose of incriminating those patients," which does. *Id.* at 84-85 (emphasis omitted); see also *id.* at 78 n.13 (expressly distinguishing state mandatory duty to report child abuse from other situations where the "hospital staff would intentionally set out to obtain incriminating evidence from their patients for law enforcement purposes").

To take another example, in evaluating searches by private parties, courts have held that only where the private party acts as an "agent or instrument of the state," by virtue of the government's active role in instigating or conducting a search, does the Fourth Amendment apply.[5] *United States* v. *Sherwin*, 539 F.2d 1, 6 (9th Cir. 1976) (en banc) (Kennedy, J.); see, *e.g.*, *United States* v. *Jarrett*, 338 F.3d 339, 346 (4th Cir. 2003) ("[T]here must be some evidence of Government participation in or affirmative encouragement of the private search before a court will hold it unconstitutional."), cert. denied, 540 U.S. 1185 (2004); *United States* v. *Smythe*, 84 F.3d 1240, 1242 (10th Cir. 1996) (holding private actor is not an agent of the state unless "the government coerces, dominates or

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[5] Some courts have also asked whether the private party's primary aim in conducting the search was to assist the government, rather than to "serve his own interests." *United States* v. *Cameron*, 699 F.3d 621, 637 (1st Cir. 2012) (holding that Yahoo!, a private Internet Service Provider, did not act as government agent by scanning its customers' accounts for child pornography because it acted pursuant to its own internal policy), cert. denied, 133 S. Ct. 1845 (2013); see also *United States* v. *Walther*, 652 F.2d 788, 792 (9th Cir. 1981) ("The presence of law enforcement officers who do not take an active role in encouraging or assisting an otherwise private search has been held insufficient to implicate [F]ourth [A]mendment interests, especially where the private party has had a legitimate independent motivation for conducting the search.").

directs" his actions in conducting the search) (citation omitted); cf. *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 614-615 (1989) (whether the requisite agency relationship exists "necessarily turns on the degree of the Government's participation in the private party's activities").

And in determining whether the government's use of a private party violated a defendant's Sixth Amendment right to counsel, this Court has distinguished between an informant who serves as a mere "listening post" and one who is directed to actively elicit information from a represented defendant. As this Court stated in *Kuhlmann* v. *Wilson*, 477 U.S. 436 (1986), "a defendant does not make out a violation of [the Sixth Amendment] simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police." *Id.* at 459. Rather, this Court held such a violation is established only where "the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Ibid.*

The Ohio reporting statute required the day care teachers to report what they learned in the course of their "routine" responsibilities to care for their young students, *Ferguson*, 532 U.S. at 84-85, akin to serving as "listening post[s]," *Wilson*, 477 U.S. at 456 n.19 (citation omitted). They were not required to investigate on the State's behalf. To the extent that the teachers asked questions, they acted from professional obligation and private concern, rather than at the

command and direction of the State. The Confrontation Clause does not equate them with the police.[6]

3. As the dissent below observed, all States have enacted a mandatory reporting requirement for child abuse and neglect, and 18 States and Puerto Rico require *all* adults to report physical or sexual abuse of vulnerable populations such as children, individuals with disabilities, or the elderly. See Pet. App. 38a n.4; see also Child Welfare Info. Gateway, U.S. Dep't Health & Human Servs., *Mandatory Reporters of Child Abuse and Neglect* (Nov. 2013) (summarizing state reporting duties).[7] Yet, the Ohio Supreme Court decision stands virtually alone in finding the teachers acted as law enforcement agents in the absence of *any* police involvement in the questioning and solely by virtue of their reporting duty. See Pet. App. 37a-38a (O'Connor, C.J., dissenting) (citing cases); *id.* at 37a ("It does not appear that any court has held that a mandatory reporter is an agent of law enforcement when, as here, there is no police involvement in the interview."); *People* v. *Phillips*, 315 P.3d 136, 165 (Colo. App. 2012) ("Courts in other jurisdictions, however, have held that the mere fact of a declarant making a hearsay statement to a statutorily defined mandatory reporter does not make the statement testimonial."), cert. denied, No. 12SC952, 2013 WL 5308307 (Colo. Sept. 23, 2013), cert. denied, 134 S. Ct. 1325

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[6] That treatment of reporting obligations is consistent with historical practice. At common law, every person had "a duty to raise the 'hue and cry' and report felonies to the authorities." *Branzburg* v. *Hayes*, 408 U.S. 665, 696 (1972). But that duty did not transform everyday citizens into police actors.

[7] https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm.

(2014).[8] That position is correct: the Ohio Supreme Court erred by treating Whitley and Jones as law enforcement agents when conducting the Confrontation Clause analysis.

D. The Day Care Teachers In This Case Did Not Act As Agents Of Law Enforcement In Questioning L.P.

Stripping away the incorrect legal conclusion that the Ohio Supreme Court drew from the reporting statute, it is clear that Jones and Whitley did not act at the behest of law enforcement. The police were not aware of L.P.'s arrival at school with a bloodshot eye and red welts on his face, nor did they direct L.P.'s teachers' understandable efforts to find out what happened. No law enforcement officers were even present. Nothing about the questioning itself—which sought to identify the source of L.P.'s injuries—suggested that the statutory duty to report abuse altered the teachers' interaction with their student. Indeed, it was Whitley and Jones's supervisor, Ms. Cooper, who first raised the reporting requirement, and only after L.P. made the relevant declaration—that "Dee" was responsible. J.A. 64-65. Whitley then called the county social service agency's reporting line, "696-KIDS."[9] J.A. 36-37. The police were not

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[8] In *People* v. *Stechly*, 870 N.E.2d 333, 365-367 (Ill. 2007), the court found that the witnesses' "status as mandated reporters" did "buttress" the conclusion that they were "acting as agents of law enforcement" where "their actions appear to have had no other purpose than to obtain information to pass on to the authorities," but the court did "not hold[] that every mandated reporter acts as an agent of law enforcement in every interview."

[9] At respondent's trial, Whitley testified that she understood "696-KIDS" to be "a number you call if a child is in need for some sort of service, if the child is hurt, being physically abused, sexual-

summoned until the next day, and then only after a second social worker found L.P. at respondent's mother's home and discovered that L.P. and A.T. had suffered additional, severe injuries, abuse, and neglect. J.A. 91-105. Those facts convincingly demonstrate that the day care teachers were far removed from the prosecutorial enterprise and did not interview L.P. on behalf of police.

II. L.P.'S STATEMENT TO HIS DAY-CARE TEACHERS IDENTIFYING "DEE" AS HIS ABUSER WAS NONTESTIMONIAL

L.P., an abused child, did not provide testimony when he identified his abuser to his teachers. Contrary to the Ohio Supreme Court's conclusion, the teachers acted from their primary duty to protect the health and welfare of a child in their charge. And by focusing exclusively on the teachers' purported motives, the Ohio Supreme Court ignored the declarant, thus failing to determine what, if any, purpose a reasonable child in L.P.'s position would have had in answering his teachers' questions. In particular, the court did not consider that L.P was only three years old—which suggests he would not have reasonably appreciated future legal consequences of his declaration.

A. The Teachers, As Civilians, Acted Out Of A Protective, Rather Than A Prosecutorial, Motive

By mischaracterizing the day care teachers as agents of law enforcement, the Ohio Supreme Court

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ly abused, there's a number that we call to make sure everything's okay." J.A. 36-37. She further described her understanding of the mandatory reporting duty as requiring her "to report what is going on when it comes to the safety of a child." J.A. 37.

misconstrued the purpose of the teachers' inquiries and wrongly presumed that, if the teachers were not responding to an emergency, they must have had the primary purpose of gathering evidence to support a criminal prosecution. See Pet. App. 15a-16a. That is a false dichotomy. A primary concern for a child's welfare may exist even if a trip to the hospital or separation from an abuser is not immediately necessary. And where the primary purpose is something other than gathering statements for use at a criminal trial, "the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Bryant*, 131 S. Ct. at 1155; *Giles* v. *California*, 554 U.S. 353, 376 (2008) ("Statements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules."). The circumstances of this case objectively show that the day care teachers sought primarily to protect L.P. rather than to gather statements for use at a future criminal trial.

1. When L.P. entered the day care, his teachers assumed a "special responsibility" for his health and well-being. Pet. App. 35a (O'Connor, C.J., dissenting) (quoting *Yates*, 808 N.E.2d at 870). After observing L.P's bloodshot eye and facial welts, his teachers asked "what happened" and "who did this." A reasonable teacher's primary purpose in asking L.P. to identify the source of his injuries was not to "nail down the truth about past criminal events," but to ascertain whether an "immediate threat" existed in the schoolhouse, *Davis*, 547 U.S. at 829-830, to determine whether L.P. had an urgent need for medical care, and

to decide whether he could be returned home at the end of the day.

These initial inquiries therefore were designed to establish that L.P. had not been harmed at the day care and that no immediate threat was posed to his safety or the safety of other children. See J.A. 64 (Jones indicated that she did not know if "Dee" was a child or an adult); see also *Davis*, 547 U.S. at 832 (observing that, even where police are responding to a crime scene, the "initial inquiries," required to "assess the situation" and "possible danger to the potential victim," may "produce nontestimonial statements") (citations omitted). Only once L.P. provided these initial answers—which are the only statements at issue in this case—and observed additional injuries, did the day care teachers develop sufficient suspicion of abuse to call the social services' hotline.

Even where teachers suspect physical abuse at the outset of questioning, they have an immediate protective need to learn who cause it, which the Ohio Supreme Court disregarded. The teachers maintained only temporary custody of the child; absent social services' intervention, L.P. would be (as he was) returned to respondent's custody when the school day ended. Questions like "what happened" and "who did this" therefore allowed the teachers to assess whether the child-victim faced imminent danger when the school bell rang. See *Seely* v. *State*, 282 S.W.3d 778, 789 (Ark.) ("The identity of anyone who may have harmed J.B. was relevant to ensuring her safety after she left the hospital."), cert. denied, 555 U.S. 898 (2008).[10]

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[10] L.P.'s situation illustrates the potential urgency of substantiating suspected child abuse. At the end of L.P.'s school day, re-

The threat to an abused child is distinguishable from *Hammon*, where the victim of domestic violence was an adult and gave her statement to police "at some remove in time from the danger she described." 547 U.S. at 832. The adult victim in *Hammon* had both the legal authority and the physical means to leave her house as soon as the police departed. In stark contrast, at the end of the day, L.P. was returned to the custody of his abuser.

2. The Ohio Supreme Court also failed to properly examine other circumstances that would illuminate whether the "primary purpose" of L.P.'s statements was "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. The encounter was spontaneous; the teachers spoke to L.P. in a classroom with other children nearby, and the exchange was brief, "fluid and

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spondent took L.P. from the day care, notwithstanding the fact that a county social worker was at the scene, actively trying to assess L.P.'s situation. J.A. 149-153; see J.A. 150-151 (social worker testified that "[respondent] stepped forward, grabbed the child * * * said he didn't have any time for this * * * We had, you know, kind of a stare down * * * I didn't want to get into a physical altercation * * * [Respondent] proceeded to leave out the door and got straight into his car.").

A second social worker spent that day and the next day searching for L.P., only to discover him and his sister, A.T., at respondent's mother's house suffering from far more severe injuries and neglect than even the day care teachers appreciated. J.A. 92-101. These injuries were so striking that the social worker called for police assistance, and soon after, an ambulance was summoned to remove the children and provide them with immediate medical care. J.A. 101-107.

somewhat confused." *Bryant*, 131 S. Ct. at 1166. The teachers did not solicit details on the chronology of L.P's injuries, cf. *Davis*, 547 U.S. at 820, but only a modicum of information necessary to assess L.P.'s current condition and whether another student had caused his injuries. See *Bryant*, 131 S. Ct. at 1166 (asking victim "'what had happened, who had shot him, and where the shooting occurred' * * * solicited the information necessary to enable [police] 'to meet an ongoing emergency'") (citations omitted).

Significantly, the teachers did not reduce L.P.'s oral statements to a formal, written, or sworn document. Nothing about the interaction was formal—neither the questions nor the responses. Cf. *Bryant*, 131 S. Ct. at 1160, 1166-1167 (formality of statement matters in determining whether it is testimonial); *Davis*, 547 U.S. at 831 n.5 ("We do not dispute that formality is indeed essential to testimonial utterance."); see *id.* at 836-838 (Thomas, J., concurring in the judgment in part and dissenting in part) (a "requirement of solemnity" and formality must exist before interactions with the police implicate the Confrontation Clause, absent prosecutorial evasion); see also *Williams* v. *Illinois*, 132 S. Ct. 2221, 2255 (2012) (Thomas, J., concurring in the judgment) (same).

The questioning here bears no resemblance to the *ex parte* witness statements condemned in *Crawford*. See *Davis*, 547 U.S. at 830 (describing the statements at issue in *Crawford* and *Hammon* as having "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed"). Rather, the circumstances of this case bear all the hallmarks of teachers focused on protecting the health and welfare of their young charge.

B. A Reasonable Child In L.P.'s Position Would Not Have Foreseen That His Statement Would Be Used As Evidence In Future Criminal Proceedings

The Ohio Supreme Court also failed to consider L.P.'s purpose in answering his teachers' questions. See Pet. App. 15a ("[H]is teachers acted to fulfill their duties to report abuse."); *id.* at 16a ("[T]he primary purpose of that inquiry * * * was an information-seeking process to determine what occurred in the past and who had perpetrated the abuse."). Indeed, in deciding whether L.P's statement was testimonial, the court gave no consideration to the fact that he was only three years old. A young child's response to his teachers' classroom inquiry is far from the core Confrontation Clause concerns, as it is unlikely that such child would have been capable of understanding the future consequences of his statement, much less contemplate its use in a criminal trial.

1. This Court has emphasized that the *declarant's* purpose—divined from an examination of the actions and statements of all parties—is of paramount importance to the Confrontation Clause analysis. See *Bryant*, 131 S. Ct. at 1161 n.11 ("[I]t is the statements, and not the questions, that must be evaluated under the Sixth Amendment."); see also *id.* at 1169 (Scalia, J., dissenting) ("A declarant-focused inquiry is also the only inquiry that would work in every fact pattern implicating the Confrontation Clause."). Given the difficulty inherent in discerning a young child's purpose, cf. *J.D.B.* v. *North Carolina*, 131 S. Ct. 2394, 2403 (2011), it is unsurprising that, faced with a child declarant, many courts have focused on the adult interrogator's intent. See, *e.g.*, *In re Rolandis G.*, 902 N.E.2d 600, 610 (Ill. 2008), cert. denied, 556 U.S. 1274

(2009); *State* v. *Bentley*, 739 N.W.2d 296, 300 (Iowa 2007), cert. denied, 552 U.S. 1275 (2008); *People* v. *Duhs*, 947 N.E.2d 617, 620 (N.Y. 2011). But, in keeping with this Court's post-*Crawford* Confrontation Clause jurisprudence, courts must make an objective determination of the child's primary purpose.

This Court has not decided whether and how a child's age factors into an otherwise objective analysis, but it has recognized that courts must evaluate "all of the relevant circumstances" of the declaration, *Bryant*, 131 S. Ct. at 1162, including the declarant's "physical state," *id.* at 1161-1162. See *id.* at 1159 (stating that a victim's medical condition "is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions"). Age is plainly one such circumstance, and it is therefore a relevant, and potentially critical, factor that courts should consider when deciding whether a child's statement is testimonial. See, *e.g.*, *People* v. *Vigil*, 127 P.3d 916, 925 (Colo.) ("[A] person's age is a pertinent characteristic for analysis."), cert. denied, 549 U.S. 842 (2006); *People* v. *Stechly*, 870 N.E.2d 333, 362-363 (Ill. 2007) (Age is "one of the objective circumstances to be taken into account."); *Commonwealth* v. *Allshouse*, 36 A.3d 163, 181 (Pa. 2012) (holding that a child's age is a relevant, albeit not determinative factor in the Confrontation Clause analysis), cert. denied, 133 S. Ct. 2336 (2013); *Lagunas* v. *State*, 187 S.W.3d 503, 519 (Tex. App. 2005) (Declarant's "age [of four years] and her emotional state are factors strongly

suggesting" her statements to a police officer were nontestimonial.).[11]

2. Here, it can hardly be disputed that a three-year-old child in L.P.'s position would not have equated his answers to a solemn declaration of fact, nor would he have foreseen that his statement might be used in a future criminal trial. When a child is so young as to be unable to formulate such a purpose, he is comparable to the injured shooting victim in *Bryant*, whose condition renders his answers "simply reflexive." 131 S. Ct. at 1161. A child's inability to appreciate the potential for his statements to have future consequences for the accused, much less be used in a criminal prosecution, must weigh heavily against a finding that the statement was testimonial. See Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 Law & Contemp. Probs. 243, 251-252 (2002) ("With respect to

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[11] Although common law cases varied on whether they would admit a child's out-of-court statements into evidence, practice from the 17th and 18th centuries suggests no blanket prohibition on the admission of a child's hearsay as evidence against a defendant, even where the child was deemed incompetent to testify. See 4 William Blackstone, *Commentaries* *214 (1769); Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post*-Davis, 82 Ind. L.J. 1029, 1038, 1052-1053 (2007). The value of historical practice may be limited because child abuse and neglect was rarely prosecuted in or around the time of the Founding and is a more modern development in the law. See Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* 13-20 (2000); Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford's *Impact on Domestic Violence and Child Abuse Cases*, 71 Brook. L. Rev. 311, 312 (2005). But no clear common law tradition against use of such statements exists that might inform this Court's elaboration on the testimonial standard.

very young children * * * we should admit their statements for what they are worth, without pretending that the children have the capacity to act like adults.").

In responding to his teachers' questions, L.P. "was not acting as a *witness*"; he "was not *testifying*" against respondent. *Davis*, 547 U.S. at 828. L.P was instead responding to his teachers' concerns regarding "the existence and magnitude of a continuing threat" to L.P.'s immediate safety and well-being. *Bryant*, 131 S. Ct. at 1159. His responses were not testimonial under *Crawford*.

CONCLUSION

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 13-1352

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF *AMICUS CURIAE* AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Professional Society on the Abuse of Children is the leading national organization for professionals who serve children and families affected by child maltreatment, which includes both abuse and neglect. As a multidisciplinary group of professionals, APSAC achieves its mission in a number of ways—most notably through expert training and educational activities, policy leadership and collaboration, and consultation that emphasizes theoretically sound, evidence-based principles.

APSAC is a 27-year-old organization that has played a central role in developing professional guidelines that address child maltreatment and, as such, is well qualified to inform the Court about the nature of child maltreatment and the ways society acts to prevent it. APSAC is submitting this *amicus* brief to assist the Court in understanding the perspectives of children who disclose maltreatment and of mandatory reporters—such as teachers, doctors, and social workers—who have a statutory duty to report it. Both children and mandatory reporters act with the primary purpose of protecting against further harm.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation or submission of this brief. All parties have consented to this filing in letters that have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Child maltreatment is a problem of staggering dimensions in our society. By the age of 18, one in eight children is a victim.[2] And the social consequences are huge. Aside from causing long-lasting physical and mental harm to the victims, maltreatment costs $124 billion annually in the United States alone.[3]

To protect children, all fifty states have passed mandatory-reporting statutes. These statutes require certain individuals—teachers, social workers, therapists, doctors, and, in many states, everyone—to report suspected maltreatment to government agencies, including child-protective services or the police. These statutes play a key role in protecting children.

These statutes also raise important questions under the Confrontation Clause. The clause requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. amend. VI; *see Crawford v. Washington*, 541 U.S. 36, 53 (2004) (concluding that the Confrontation Clause bars "testimonial hearsay" absent an opportunity to cross-examine the declarant). The question in this case is whether a three-year-old's disclosure of abuse to his preschool teacher was testimonial and thus inadmissible in a criminal prosecution. More broadly, the question in cases across the country is whether young children's disclosures of maltreatment to mandatory reporters are testimonial.

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[2] Christopher Wildeman, et al., *The Prevalence of Confirmed Maltreatment Among American Children, 2004-2011*, 168 JAMA Pediatrics 706, 709 (2014).

[3] Xiangming Fang, et al., *The Economic Burden of Child Maltreatment in the United States and Implications for Prevention*, 36 Child Abuse & Neglect 156, 161 (2012).

The clear answer to these questions is no. As an initial matter, the Court has not decided whether statements to anyone other than the police can be testimonial. *Davis v. Washington*, 547 U.S. 813, 823 n.2 (2006). But even if they can be testimonial under the primary-purpose test—a test that the Court has applied solely to police interrogations—the answer is the same. This test defines statements as testimonial only if the primary purpose of the interrogation is to "creat[e] an out-of-court substitute for trial testimony." *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011). The perspectives of both the declarant and the questioner are relevant. *Id.* at 1160.

And from both perspectives—the young child's and the mandatory reporter's—these disclosures of maltreatment are not in any sense testimonial. Neither has the primary purpose of creating a substitute for trial testimony:

Children's primary purpose in disclosing maltreatment is to protect themselves and other victims from further harm. Young children have little or no understanding of the criminal-justice process. They do not recognize that their disclosures to mandatory reporters can be used in trial or, for that matter, that their disclosures can lead to trial at all. Children are most often mistreated by their caretakers, and in this context, they are particularly unlikely to anticipate or want their disclosures to lead to trial. As the Court has recognized, "children cannot be viewed simply as miniature adults." *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2397 (2011). And this is especially so when evaluating their primary purpose in disclosing maltreatment.

Mandatory reporters, for their part, also act with the primary purpose of protecting children—not

prosecuting abusers. Most states recognize that the purpose of mandatory reporting is to protect vulnerable children. States carry out this purpose by focusing on the child's and family's welfare rather than on criminal justice. In fact, "[m]ost substantiated and founded child abuse cases do not lead to prosecution"[4] and instead are the sole province of child-protective services.

For these reasons, the Court should conclude that young children's disclosures of maltreatment to mandatory reporters are non-testimonial. This conclusion will also improve the judicial process. Prosecutors will continue to present child victims in court, recognizing that jurors want to see the victims. And when the victims are unavailable, courts will screen their disclosures—which generally are reliable—under the rules of evidence. To conclude otherwise would make it much more difficult to prosecute cases of child maltreatment. "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987); *see also* Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius*, 415–16 (Dublin, Elizabeth Watts 1768) (explaining the importance of children's hearsay "in cases of foul acts done in secret, where the child is the party injured"). The Confrontation Clause was not meant to insulate entire categories of offenses from prosecution.

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[4] Theodore P. Cross, et al., *Prosecution of Child Abuse: A Meta-Analysis of Rates of Criminal Justice Decisions*, 4 Trauma, Violence & Abuse 323, 333 (2003).

ARGUMENT

I. YOUNG CHILDREN'S DISCLOSURES OF MALTREATMENT TO MANDATORY REPORTERS ARE NON-TESTIMIONIAL UNDER THE PRIMARY-PURPOSE TEST

Under the primary-purpose test, statements are testimonial only when the primary purpose is to create an out-of-court substitute for trial testimony. *Bryant*, 131 S. Ct. at 1155; *see also Davis*, 547 U.S. at 822 (explaining that the purpose must be "to establish or prove past events potentially relevant to later criminal prosecution"). By contrast, statements are non-testimonial when the primary purpose is something else—for example, to respond to an emergency or to protect the declarant by "incapacitat[ing] temporarily or rehabilitat[ing]" the perpetrator. *Bryant*, 131 S. Ct. at 1161. Likewise, statements are non-testimonial when the declarant has "no purpose at all" and is simply speaking "reflexive[ly]." *Id.*

This test considers the perspectives of both the declarant and the questioner. *Id.* at 1160. And it requires an objective evaluation: "[t]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id.* at 1156.

An objective evaluation of conversations between young children and mandatory reporters reveals that from both perspectives—the young child's and the mandatory reporter's—the primary purpose is not to create a substitute for trial testimony.

A. Young Children Neither Expect Nor Want Their Disclosures To Be Used To Prosecute Abusers

Young children are different in many ways from adults. These differences matter under the primary-purpose test, which assesses "the understanding and purpose of a reasonable victim in the circumstances of the actual victim," including "the victim's physical state." *Bryant*, 131 S. Ct. at 1161–62 (indicating that a statement would be non-testimonial if the declarant were so physically incapacitated "as to prevent her from thinking sufficiently clearly to understand whether her statements are for . .the purpose of future prosecution"). Any such objective test must "account for th[e] reality" that a reasonable child is different from a reasonable adult. *J.D.B.*, 131 S. Ct. at 2403, 2406 (rejecting the notion "that courts must blind themselves to a juvenile defendant's age" in a *Miranda* custody analysis). Indeed, "it is the odd legal rule that does not have some form of exception for children." *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012).

1. Young children do not appreciate that their disclosures may be used at trial because they do not fully understand the legal system.

The social science on this point is clear: young children understand little about the legal system. They believe that the police punish criminals but have little or no appreciation of the criminal-justice process. So they are unlikely to speak to mandatory reporters with the purpose of creating a substitute for trial testimony—much less with the *primary* purpose of doing so.

Research on children's understanding of the legal system finds that whereas children have some appreciation of the role of the police, they have little understanding of prosecution until they are ten years old.[5] For example, when asked who sends people to jail, "[t]he majority of children eight and younger mentioned police," while older children mentioned

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[5] Alexia Cooper, Allison R. Wallin, Jodi A. Quas & Thomas D. Lyon, *Maltreated and Nonmaltreated Children's Knowledge of the Juvenile Dependency Court System*, 15 Child Maltreatment 255, 258 (2010) (concluding that 65 percent of four- to seven-year-olds could provide partially correct definitions of "police" but overall "knew very little about the legal system"); *see also* Catherine Maunsell, et al., *What Happens in Court? The Development of Understanding of the Legal System in a Sample of Irish Children and Adults*, 21 Irish J. Psychol. 215, 221, 222 (2000) (surveying 4- to 18-year-olds and adults); Michelle Aldridge, et al., *Children's Understanding of Legal Terminology: Judges Get Money at Pet Shows, Don't They?*, 6 Child Abuse Rev. 141 (1997) (surveying 5- to 10-year-olds); Karen Saywitz et al., *Children's Knowledge of Legal Terminology*, 14 Law & Hum. Behav. 523, 528-30 (1990) (surveying 5- to 11-year-olds); Rhona H. Flin, et al., *Children's Knowledge of Court Proceedings*, 80 British J. Psychol. 285, 291 (1989) (surveying 6- to 10-year-old children and adults). Some of the research can be criticized for underestimating children's understanding because children were often asked to define terms and provided little context. *See* Karen J. Saywitz, *Children's Conceptions of the Legal System: "Court Is a Place to Play Basketball"* in Stephen J. Ceci, et al., eds., *Perspectives on Children's Testimony* 131, at 154 (1989) ("[C]hildren are likely to know more about a concept than they can express in verbal statements."). But even with more context—such as vignettes in which children testify in court—young children still do not understand the roles of attorneys and juries. *See* Judy Cashmore & Kay Bussey, *Children's Conception of the Witness Role*, in J.R. Spencer, et al., eds., *Children's Evidence in Legal Proceedings: An International Perspective* 177, at 179 (1989) (surveying 6- to 14-year-olds).

both the police and judges.[6] Young children who speak directly to the police might anticipate that their disclosures will lead to punishment because they associate the police with "the punitive role."[7] But they are unlikely to understand that their disclosures to mandatory reporters and others will lead to punishment because they do not associate them with this role. Indeed, one study that questioned former child sexual abuse witnesses up to 20 years old—much older than the victim in this case—found that the "vast majority" had not expected that "the police would be called when they disclosed" the abuse.[8]

Even children who have some understanding of the legal system are unlikely to be aware of the possible

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[6] Amye Warren-Leubecker, et al., *What Do Children Know About the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research*, in Stephen J. Ceci, et al., eds., *Perspectives on Children's Testimony* 158, at 170 (surveying 2- to 14-year-olds). *See also* Saywitz, *Children's Conceptions*, *supra*, at 135 (discussing a survey of 6- to 10-year-olds that found "[a]t the initial phase, children believed that an offense could go unpunished or that the accused could be arrested, condemned, and punished by the police. In a second phase, children began to understand that arrest leads to an intermediary stage where a judge, rather than the police, makes a decision about guilt and punishment").

[7] Martine B. Powell, et al., *Children's Perceptions of the Role of Police: A Qualitative Study*, 10 Int'l J. of Police Science & Mgmt. 464, 470 (2008) (surveying 5- to 8-year-olds and finding that "children predominantly identify policing with the punitive role, such as arresting criminals, shooting guns, killing and hurting people").

[8] Child Witness Project, *Three Years After the Verdict: A Longitudinal Study of the Social and Psychological Adjustment of Child Witnesses Referred to the Child Witness Project* 55 (1993) (interviewing 8- to 20-year-olds approximately three years after the criminal cases ended).

evidentiary use of their disclosures. It is one thing for children to understand that the police put criminals in jail—it is another entirely for them to expect that their disclosures to a teacher or doctor will be admitted as evidence in a criminal trial. For these reasons, unless young children are questioned by a uniformed police officer[9] or are explicitly told that their statements will be used by the police, they are unlikely to believe that the statements will lead to criminal punishment.

2. Many children do not want their disclosures to lead to criminal punishment because of their relationship with the abuser.

The sad reality is that child victims are generally abused by someone they know. Most sexual abuse is committed by someone close to the child, usually a parent or a parental figure.[10] And the same is true of physical abuse, which nearly always is committed by a caretaker.[11] Children in these difficult situations are

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[9] Young children believe that police officers who are not in uniform do not have authority to arrest—particularly when the officers fail to identify themselves. Kevin Durkin & Linda Jeffrey, *The Salience of the Uniform in Young Children's Perception of Police Status*, 5 Legal & Criminological Psychol. 47, 52 (2000) (surveying 5- to 9-year-olds and finding that "younger children were more likely to select a non-policeman in police uniform as allowed to carry out an arrest than they were to select a policeman out of his uniform").

[10] *See* Thomas D. Lyon & Julia Dente, *Child Witnesses and the Confrontation Clause*, 102 J. Crim. L. & Criminology 1181, 1203–04 (2012) ("Virtually all sexual abuse is perpetrated by someone the child knows. . . . [C]riminal samples are made up primarily of perpetrators close to the child, with the most common single type a parent or parent figure.").

[11] *See* Irit Hershkowitz, *Delayed Disclosure of Alleged Child Sexual Abuse Victims in Israel*, 76 Am. J. Orthopsychiatry 444,

particularly unlikely to disclose abuse with the purpose of creating a substitute for trial testimony.

Children are reluctant to disclose abuse in part because they fear repercussions to the abuser. Studies that assess the willingness of children to disclose transgressions have shown that children are less likely to disclose transgressions by their parents than by strangers.[12] More to the point, population surveys and clinical studies have shown that children are less likely to disclose sexual abuse—and more likely to delay disclosing—when it is committed by familiar adults.[13] Indeed, this reluctance has played an important role in the Court's case law. In *Kennedy v. Louisiana*, for example, the Court recognized that executing child rapists may deter disclosure: "one of the most commonly cited reasons for nondisclosure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member." 554 U.S. 407, 445 (2008).[14] And in

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447, table 2 (2006) (reviewing Israeli data). Most child witnesses in criminal court are victims of either sexual or physical abuse. Gail S. Goodman, et al., *Innovations for Child Witnesses: A National Survey*, 5 Psychol. Pub. Pol'y & L. 255, 264–65 (1999).

[12] Thomas D. Lyon et al., *Children's Reasoning About Disclosing Adult Transgressions: Effects of Maltreatment, Child Age, and Adult Identity*, 81 Child Dev. 1714, 1720–21 (2010); Marcus Choi Tye, et al., *The Willingness of Children to Lie and the Assessment of Credibility in an Ecologically Relevant Laboratory Setting*, 3 Applied Dev. Sci. 92, 95–96 (1999).

[13] Lyon & Dente, *supra*, at 1210 ("The most common factor that predicts delay in reporting abuse is the relationship between the perpetrator and the child: the closer the relationship, the longer the delay. This is true in population surveys, clinical samples, and criminal samples").

[14] The Court cited three studies for this proposition: Tina B. Goodman-Brown, et al., *Why Children Tell: A Model of Children's*

Pennsylvania v. Ritchie, the Court recognized that a child may be especially unwilling to report abuse "when the abuser is a parent." 480 U.S. at 60.

Even when children disclose abuse by adults close to them, they are not seeking criminal punishment. After all, as noted above, most children who disclose sexual abuse do not anticipate that the police will become involved, and this is especially true in cases of abuse by a family member.[15] Rather, children disclose abuse primarily to make it stop and to protect other victims.[16] Even subsequent to disclosure and formal intervention, young children are unlikely to be motivated by prosecution. Children are more likely to recant allegations of sexual abuse if they are younger and the abuser lived in their home.[17]

Disclosure of Sexual Abuse, 27 Child Abuse & Neglect 525, 527–28 (2003); Daniel W. Smith, et al., *Delay in Disclosure of Childhood Rape: Results From A National Survey*, 24 Child Abuse & Neglect 273, 283-84 (2000); Rochelle F. Hanson, et al., *Factors Related to the Reporting of Childhood Rape*, 23 Child Abuse & Neglect 559, 565–66, table 3 (1999).

[15] Child Witness Project, *supra*, at 55 (interviewing 8- to 20-year-olds approximately three years after the criminal cases ended).

[16] *Id.* at 48–49.

[17] Lindsay C. Malloy, et al., *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. Am. Acad. Child & Adolescent 162, 165 (2007).

3. The Court has recognized that children often lack the same purpose and understanding as adults.

Much of this research establishes the basic principle—well known to any parent—that young children do not fully appreciate the consequences of their actions. The Court has consistently relied on this same principle in defining other constitutional rights.

In Eighth Amendment cases, for example, the Court has relied "on science and social science" to show that teenagers have a limited ability to appreciate the consequences of their actions when compared to adults. *Miller*, 132 S. Ct. at 2464, 2468 ("Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."); *Graham v. Florida*, 560 U.S. 48, 78 (2010) (similar); *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (similar); *Eddings v. Oklahoma*, 455 U.S. 104, 115–117 (1982) ("[M]inors are generally less mature and responsible than adults."). Of course, these conclusions hold true for younger children as well, such as the three-year-old victim in this case.

The Court has also recognized the significance of age in Fourth and Fifth Amendment cases. The Court recently held that a suspect's age must be considered in determining whether a reasonable person in the suspect's position would believe that she was under arrest. *See J.D.B.*, 131 S. Ct. at 2402–03 ("[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any

damage to the objective nature of the custody analysis."). In so holding, the Court aptly described age as "a fact that 'generates commonsense conclusions about behavior and perception'" and noted that these conclusions are "self-evident to anyone who was once a child himself, including any police officer or judge." *Id.* at 2403 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)); *see also Gallegos v. Colorado*, 370 U.S. 49, 53 (1962) ("[The petitioner] cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions."); *Kaupp v. Texas*, 538 U.S. 626, 631 (2003) (considering among other factors that the defendant was a "17-year-old boy" in finding that he was arrested without probable cause).

* * *

The social science and the Court's jurisprudence support the same conclusion. In the maltreatment context, young children generally do not recognize that their statements will be used at trial and often do not want a trial at all. For these reasons, their disclosures to mandatory reporters do not have "a primary purpose of creating an out-of-court substitute for trial testimony" and therefore are not testimonial under the Confrontation Clause. *Bryant*, 131 S. Ct. at 1155.

B. Mandatory Reporters' Primary Purpose Is To Protect Children—Not To Create Evidence To Prosecute Abusers

The other participants in these conversations—mandatory reporters—also lack a primary purpose of creating a substitute for trial testimony. Instead, their primary purpose is to protect children. And this is true even absent an emergency or immediate threat to the

child, which puts mandatory reporters in the "*other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Id.*

1. By statute, mandatory reporters' primary purpose is to protect children and rehabilitate the family.

All fifty states have adopted mandatory-reporting statutes. The statutes require certain people—particularly those who come in close contact with children—to report suspected child maltreatment to government agencies such as child-protective services and the police. These statutes emphasize the need to protect the child and rehabilitate the family.

Many states have explicitly identified the primary purpose of mandatory reporting as "protect[ing] children whose health and welfare may be adversely affected" through abuse or neglect. Ala. Code § 26-14-2; *see also* Cal. Penal Code § 11164(b) ("The intent and purpose of this article is to protect children from abuse and neglect."); Colo. Rev. Stat. Ann. § 19-3-302 ("[I]t is the intent of the general assembly to protect the best interests of children of this state and to offer protective services . "); Del. Code Ann. tit. 16, § 901 ("The child welfare policy of this State shall serve to advance the best interests and secure the safety of the child "); D.C. Code § 4-1321.01 ("It is the purpose of this subchapter to protect the child ").[18] In other

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[18] *See also* Alaska Stat. Ann. § 47.17.010; Conn. Gen. Stat. Ann. § 17a-101; R.I. Gen. Laws Ann. § 40-11-1; Vt. Stat. Ann. tit. 33, § 4911; Ga. Code Ann. § 19-7-5; Idaho Code Ann. § 16-1601; 325 Ill. Comp. Stat. 5/2; Ind. Code Ann. § 31-33-1-1; Iowa Code Ann. § 232.67; Kan. Stat. Ann. § 38-2201; Ky. Rev. Stat. Ann. § 620.010; La. Child. Code Ann. art. 601; Me. Rev. Stat. tit. 22,

states such as Ohio, courts have identified the same purpose. *See, e.g.*, *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861, 865 (Ohio 2004) (explaining that "the *primary purpose* of reporting is to facilitate the protection of abused and neglected children rather than to punish those who maltreat them" and that prosecution is merely an "adjunct" (emphasis added)).

Likewise, many states have identified the purpose of mandatory reporting as "preserv[ing] the family life of the parents and children, to the maximum extent possible" without endangering the child. D.C. Code § 4-1321.01.[19] To fulfill this purpose, many states emphasize rehabilitation of the child's parent, guardian, or custodian—not prosecution—as the goal. States require, when possible, child-protective services to provide rehabilitative services to a child's parent, guardian, or custodian. *See, e.g.*, Iowa Code Ann. § 232.67 (specifying that "[i]t is the purpose [of this provision]. to provide the greatest possible protection to victims or potential victims of abuse" through, among other things, "providing rehabilitative services, where appropriate and whenever possible to abused children and their families which will stabilize the home environment so that the family can remain intact without further danger to the child").[20]

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§ 4003; Mass. Gen. Laws Ann. ch. 119, § 1; Minn. Stat. Ann. § 626.556.

[19] *See also* Alaska Stat. Ann. § 47.17.010, Del. Code Ann. tit. 16, § 901; Ga. Code Ann. § 19-7-5; Idaho Code Ann. § 16-1601; 325 Ill. Comp. Stat. 5/2; Iowa Code Ann. § 232.67; Kan. Stat. Ann. § 38-2201; Ky. Rev. Stat. Ann. § 620.010; La. Child. Code Ann. art. 601; Mass. Gen. Laws Ann. ch. 119, § 1; Me. Rev. Stat. tit. 22, § 4003; Minn. Stat. Ann. § 626.556.

[20] *See also* Ind. Code Ann. § 31-33-1-1; Kan. Stat. Ann. § 38-2201.

By contrast, no state has identified criminal prosecution and punishment as the primary purpose of mandatory reporting. At most, a few states have acknowledged that mandatory reporting may facilitate the "prosecution . . . of child maltreatment." *E.g.*, Ark. Code Ann. § 12-18-102(6) (listing seven purposes of the statute, including to "[e]ncourage the cooperation of state law enforcement officials, courts, and state agencies in the investigation, assessment, prosecution, and treatment of child maltreatment"). But even these states recognize that the child's welfare is paramount. *Id.* § 12-18-102(2), (3), (7) (listing other purposes of the statute, including "ensuring the immediate screening, safety assessment, and prompt investigation" of reports, "[p]rotect[ing] a maltreated child," and "[s]tabilizing the home environment if a child's health and safety are not at risk").

In short, the stated legislative purpose of mandatory reporting is to protect children. And the Court has recognized that a legislative purpose plays an important role in determining whether a statement made pursuant to the legislation is testimonial. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) ("[U]nder Massachusetts law the *sole purpose* of the affidavits" regarding results of forensic analysis requested by the police "was to provide 'prima facie evidence of the composition, quality, and the net weight" of the analyzed substance.'" (quoting Mass. Gen. Laws, ch. 111, § 13)). Consistent with the stated purpose of mandatory reporting, a "reasonable" mandatory reporter would act with the primary purpose of protecting children. *Bryant*, 131 S. Ct. at 1156 (explaining that under the primary-purpose test, "[t]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular

encounter, but rather the purpose that reasonable participants would have had").

2. States carry out this statutory purpose by investigating reports of maltreatment with a focus on protection and rehabilitation.

States have implemented their mandatory-reporting statutes in a way that confirms the purpose is to protect children and rehabilitate families—not prosecute abusers.

Mandatory reporting usually does not result in prosecution at all. Most allegations of sexual and physical abuse are investigated solely by child-protective services.[21] In turn, "most substantiated and founded child abuse cases do not lead to prosecution."[22] This is by design. Child maltreatment is a family problem—often occurring at the hands of family members or others close to the child—so states have generally chosen to address the problem through child-protective services investigations and civil proceedings in juvenile court.[23] These proceedings can lead to supervision of the family, removal of the child

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[21] *See* Theodore P. Cross, et al., *Police Involvement in Child Protective Services Investigations: Literature Review and Secondary Data Analysis*, 10 Child Maltreatment 224, 237, table 2 (2005) (finding that child-protective services were the sole investigators in 72 percent of physical-abuse allegations and 55 percent of sexual-abuse allegations in a large, nationally representative sample of investigations).

[22] Cross, *Prosecution of Child Abuse*, *supra*, at 333.

[23] U.S. Dep't of Health & Hum. Servs., *Working with the Courts in Child Protection* 45 (2006) ("Matters involving child maltreatment typically are resolved in juvenile court."), available at https://www.childwelfare.gov/pubs/usermanuals/courts/courts.pdf.

from the parents' home, and, in extreme cases, termination of parental rights. They are not, however, criminal proceedings and are not subject to the requirements of criminal procedure. *See Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (discussing the standard of proof); *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 33 (1981) (discussing the right to counsel).

These civil proceedings do not have the same goals as criminal proceedings. "[J]uvenile and criminal courts perform distinct functions in intrafamily abuse or neglect cases. The juvenile court proceeding is designed to protect children and, when possible, rehabilitate the family. The criminal proceeding is primarily designed to determine the guilt or innocence of the alleged perpetrator and, if the perpetrator is found guilty, to impose punishment."[24] Chief Justice Warren Burger recognized this same distinction in *Lassiter*: "The purpose of [a] termination proceeding is not 'punitive,'" but rather, "its purpose [is] protective of the child's best interests." 452 U.S. at 34 (Burger, C.J., concurring).

To be sure, mandatory reporting may trigger police involvement or lead to criminal charges. Indeed, some mandatory reporters go directly to the police, and a number of states require child-protective services to coordinate with the police.[25] But this possibility of

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[24] Marcia Sprague & Mark Hardin, *Coordination of Juvenile and Criminal Court Child Abuse and Neglect Proceedings*, 35 U. Louisville J. Fam. L. 239, 242–43 (1997).

[25] Child-protective services investigate cases "with alleged perpetrators who are parents, guardians, or caretakers of the alleged victim." Cross, *Police Involvement*, *supra*, at 225. Approximately half of the states require child-protective services to cross-report to the police when the suspected abuse takes place

police involvement does not mean that the primary purpose of the reporting statutes is criminal prosecution.

When child-protective services refer a matter to the police, they continue to be involved in a non-prosecutorial role.[26] Their role prioritizes the child's welfare. The police complain that investigations by child-protective services "tip[] off" abusers before the police can interrogate and that when they remove children from the home, abusers seek legal advice and no longer cooperate with the police.[27] Prosecution is foregone entirely when it would interfere with rehabilitation of the family.[28]

And even the states that require coordination between child-protective services and the police remain focused on the child. The goal of coordination is to "minimize the number of times individual

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at the hands of certain individuals outside the child's family. The police are also more likely to be notified in cases of alleged sexual abuse and in more serious cases of physical abuse. Fourteen states require child-protective services to coordinate their investigations and share information with the police. U.S. Dep't of Health & Hum. Servs., *Cross-Reporting Among Responders to Child Abuse and Neglect: Summary of State Laws* 2 (Jan. 2010).

[26] *See e.g.*, Ohio Rev. Code Ann. § 2151.421(F)(1) (requiring child-protective services to investigate cases referred to the police); Mich. Comp. Laws Ann. § 722.628(5) ("Involvement of law enforcement officials under this section does not relieve or prevent the department from proceeding with its investigation or treatment if there is reasonable cause to suspect that the child abuse or neglect was committed by a person responsible for the child's health or welfare.").

[27] Cross, *Police Involvement*, *supra*, at 230.

[28] U.S. Dep't of Health & Hum. Servs., *Working with the Courts*, *supra*, at 41 (noting that one of the "reasons to forgo prosecution [is] that it may interfere with rehabilitating families").

children are interviewed," thus protecting the child from the trauma of repeated interviewing.[29] It also improves the quality of investigations while facilitating the removal of children when their safety demands it.[30]

Finally, police involvement itself often is aimed at protection rather than at future prosecution. The police have the power both to remove children from an environment in which they are abused and to remove the person suspected of committing the maltreatment.[31] They exercise these powers to ensure the child's well-being rather than to collect evidence.

States thus use mandatory reporting to protect children. They do so through investigations and civil proceedings that may involve the police but rarely lead to criminal prosecution.

3. The Court has recognized the distinction between a protective and punitive purpose in defining other rights.

The Court has long distinguished between laws that are protective and those that are prosecutorial or punitive. These same distinctions are relevant to mandatory reporting. Indeed, they help to establish

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[29] U.S. Dep't of Health & Hum. Servs., *Cross-Reporting Among Responders to Child Abuse and Neglect*, *supra*, at 2; *see, e.g.*, Conn. Gen. Stat. Ann. § 17a-101h (explaining that the goal is to "minimize the number of interviews of any child").

[30] Cross, *Police Involvement*, *supra*, at 229.

[31] Donna Pence & Charles Wilson., *The Role of Law Enforcement in the Response to Child Abuse and Neglect* 7 (1992), available at https://www.childwelfare.gov/pubs/usermanuals/law/law.pdf.

that the primary purpose of mandatory reporting is in fact protective and not prosecutorial.

First, the fact that an act is triggered by criminal behavior and may lead to criminal prosecution does not make the act punitive. In Fourth Amendment cases, the Court has emphasized the distinction between police checkpoints with the "primary purpose" of "detect[ing] evidence of ordinary criminal wrongdoing," and those "designed to intercept illegal aliens" or "aimed at removing drunk drivers from the road." *City of Indianapolis v. Edmond*, 531 U.S. 32, 38–39 (2000). All these checkpoints identify criminal conduct and may result in arrest. But in the case of intercepting illegal aliens or removing drunk drivers, police involvement is primarily aimed at preventing future harm and thus does not violate the Fourth Amendment. *Id.*

And in the statutory context, the test to determine whether an act is punitive is "the legislative objective." *Smith v. Doe*, 538 U.S. 84, 92 (2003). Based on this test, the Court has upheld sex-offender-registration and commitment statutes under the Ex Post Facto Clause. The Court distinguished between ordinary criminal statutes and sex-offender registration and commitment statutes that are "'designed to protect the public from harm.'" *Id.* at 93 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). In each instance, intervention is "triggered" by and dependent upon prior criminal conduct. Yet intervention is non-punitive when proof of the conduct is "not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior." *Hendricks*, 521 U.S. at 361–62 (quoting *Allen v. Illinois*, 478 U.S. 364 at 371 (1986)). Here, too, mandatory-reporting statutes are meant to protect.

The fact that the behavior they report is often criminal and may lead to prosecution does not undermine their primary purpose.

Second, states often act with the primary purpose of protecting children well beyond emergencies. In the typical emergency, separating the victim from the perpetrator adequately protects the victim because the victim is capable of self-protection (or of renewing a request for protection). But while protection of adults may require only brief intervention, protection of children requires continued monitoring and repeated inquiry. Parents have exclusive custody of a child until he reaches majority, and the child "cannot usually extricate himself" from a "brutal or dysfunctional" family or home. *Miller*, 132 S. Ct. at 2468.

In *Prince v. Massachusetts*, the Court upheld the criminal conviction of a nine-year-old's guardian for allowing the child to distribute religious materials in violation of child-labor laws. 321 U.S. 158, 170 (1944). The Court rejected the dissent's argument that the harms justifying conviction must be "immediate." *Id.* at 175 (Murphy, J., dissenting). It noted that the state has a long-term interest in children being "safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." *Id.* at 165. States have this long-term interest in the safety of children in particular given the lasting effects of adverse events on their development. Like child-labor laws, mandatory-reporting statutes operate to protect the long-term well-being of children.

Third, the Constitution goes a long way in accommodating state laws that protect children. The Court has explained, for example, that "[i]t is evident beyond the need for elaboration that a State's interest

in safeguarding the physical and psychological well-being of a minor is compelling." *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (citation and quotation marks omitted); *see also Ritchie*, 480 U.S. at 60 (noting in the due-process context Pennsylvania's "compelling interest in protecting its child-abuse information" as part of its "efforts to uncover and treat abuse"). The mandatory-reporter statutes at issue are a classic example of laws aimed at protecting children.

* * *

Mandatory reporters, much like young children, do not have "a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155. Indeed, to find that mandatory reporters act with that purpose would ignore the explicit legislative purpose of mandatory-reporting statutes—which is to protect the child and rehabilitate the family.

II. THE CONCLUSION THAT YOUNG CHILDREN'S DISCLOSURES ARE NON-TESTIMONIAL WILL PROMOTE ACCURACY IN ADJUDICATING MAL-TREATMENT CASES

The practical implications of this case are straightforward. A holding that young children's disclosures to mandatory reporters are testimonial would mean that if a child is unwilling or unable to testify in a criminal trial, those disclosures cannot be admitted—no matter their accuracy. Meanwhile, a contrary holding does not mean that such disclosures must be admitted or that they will be the only evidence at trial. Instead, it would allow courts to assess the admissibility of those disclosures under the rules of evidence and, if they are admitted, allow juries to consider them along with other evidence.

A. It Will Encourage Accurate And Fair Maltreatment Prosecutions

This case will not lead to a flood of trials that rely solely on a child's hearsay. On the contrary, prosecutors already have an incentive to produce child victims because they know that jurors want to see them testify.[32] In fact, even prior to *Crawford*, prosecutors rarely relied on children's hearsay.[33] In practice, prosecutors are likely to rely on hearsay only when the child is unable to qualify as a witness, as happened in this case. JA12.

And the disclosures will still need to fall within an exception to the hearsay rule. Most states have special exceptions for children's disclosures of maltreatment. These exceptions require the court to assess the reliability of the disclosure and either require a showing of unavailability or corroboration of the maltreatment.[34]

Despite not fully understanding the legal system, young children can accurately recount events. They tend to be more suggestible, but when questioned properly, they are capable of providing reliable

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[32] John E.B. Myers et al., *Jurors' Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 Psychol. Pub. Pol'y & L. 388, 411 (1999) ("[P]rosecutors are reluctant to take child sexual abuse cases to trial unless the victim is available to testify.").

[33] Angela D. Evans & Thomas D. Lyon, *Assessing Children's Competency to Take the Oath in Court: The Influence of Question-Type on Children's Accuracy*, 36 L. & Hum. Behav. 195, 197 (2012) (finding that hearsay was admitted in lieu of children's testimony in 3 percent of child sexual abuse cases between 1997 and 2001).

[34] Nat'l Ctr. for Prosecution of Child Abuse, *Investigation and Prosecution of Child Abuse* 369–70 (3d ed. 2004).

statements.[35] Compared to older children and adults, they are less inclined to lie[36] and less capable of lying effectively.[37] They are especially unlikely to make false accusations against adults who are close to them.

Nor are children's disclosures unreliable simply because they fail to qualify as competent to testify. In the first place, young children are most likely to be unavailable because they refuse to testify or are unable to maintain their composure when testifying, not because they are declared incompetent.[38] And

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[35] Carole Peterson, *Children's Autobiographical Memory Across the Years: Forensic Implications of Childhood Amnesia and Eyewitness Memory for Stressful Events*, 32 Developmental Rev. 283, 303 (2012). Even experts who are skeptical of young children's abuse disclosures endorse the probative value of their statements. Richard D. Friedman & Stephen J. Ceci, *The Child Quasi-Witness*, U. Chi. L. Rev., manuscript at 9 (forthcoming) ("Though very young children are often more vulnerable to suggestion than adults are, their memory is reasonably good, even over an extended period. . . ." (footnotes omitted)), available at http://www-personal.umich.edu/~rdfrdman/quasi.chicago.pdf.

[36] Angela D. Evans & Kang Lee, *Emergence of Lying in Very Young Children*, 49 Developmental Psychol. 1958, 1961 (2013) (noting that children's ability to lie emerges at three years of age).

[37] Victoria Talwar et al., *Lying in the Elementary School Years: Verbal Deception and its Relation to Second-Order Belief Understanding*, 43 Developmental Psychol. 804, 809 (2007) (surveying 6- to 11-year-olds and concluding that older children are better able to maintain a lie).

[38] In this case, the child's "demeanor" and "behavior" led the trial court to find that he was not competent to testify; the court concluded, "he's gone already." JA12. Testifying in a courtroom is an inherently difficult exercise for young children. One study asked four- to eight-year-olds to testify in a mock-trial setting. Despite efforts to make the trial comfortable for the children, 25 percent "refused to testify, either by outright refusal or by appearing distressed so that the research assistant judged that the child should not continue." Gail S. Goodman et al., *Face-to-*

even when they provide inadequate responses to competency questions, the cause is typically poor questioning, compounded by the stresses of appearing in court.[39]

In this case, for example, the child—four years old at the time of trial—made several errors that are understandable given his age. He responded "no" when asked if he knew "the difference between the truth and a lie," JA7, a common response among children in court who nevertheless understand the concept of truth.[40] On the other hand, he correctly identified a false statement as a lie, stated that he would receive a "whooping" for telling lies, and affirmed that he would tell the truth. JA9. He also had trouble with questions about his birthdate, his grade in school, and his current living situation. These questions seem simple yet inquire into concepts that prove difficult for young children—in fact, nearly half of maltreated six-year-olds do not know their own birthdates.[41] Children often recall the central aspects

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Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions, 22 L. & Hum. Behav. 165, 179 (1998).

[39] Evans & Lyon, *supra*, at 201. *See also* Saywitz, *Children's Knowledge*, *supra*, at 523-24.

[40] Evans & Lyon, *supra*, at 202. The reason for this error is unclear but may have to do with children's interpretation of the question as a suggestion that the questioner will provide the information.

[41] Lindsay Wandrey, et al., *Maltreated Children's Ability to Estimate Temporal Location and Numerosity of Placement Changes and Court Visits*, 18 Psychol. Pub. Pol'y & L. 79, 90 (2012) (finding that 40 percent of maltreated 6-year-olds did not know their birthdates).

of significant events while struggling to answer temporal questions about those same events.[42]

Courts can accommodate a child's limited vocabulary by modifying their procedures and using simpler words.[43] If questioned in a child-friendly way, most children can explain the difference between truth and falsehood and know the importance of telling the truth by four years of age.[44] Even very young children who do not know the labels "truth" and "lie" reliably reject false statements.[45] Young children are unlikely to understand the word "oath," but they appreciate the significance of a "promise" at an early age.[46] They are more likely to tell the truth after promising to do so—even when they have difficulty in demonstrating their understanding of the meaning of truth and lies.[47]

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[42] *See* Peterson, *supra*, at 293.

[43] *See, e.g.*, Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. Cal. L. Rev. 1017, 1057–58 (2000) (many courts allow children to "promise to tell the truth" rather than take a formal oath).

[44] Thomas D. Lyon, et al., *Right and Righteous: Children's Incipient Understanding of True and False Statements*, 14 J. Cognition & Development 437, 451 (2013).

[45] *Id.*

[46] Saywitz, *Children's Knowledge*, *supra*, at 528 (finding that young children do not understand the word "oath"); Thomas D. Lyon & Angela D. Evans, *Young Children's Understanding That Promising Guarantees Performance: The Effects of Age and Maltreatment*, 38 L. & Hum. Behav. 162, 169 (2014) (finding that young children have some understanding of "promise" and "will," supporting asking children "do you promise that you will tell the truth?").

[47] Thomas D. Lyon, et al., *Coaching, Truth Induction, and Young Maltreated Children's False Allegations and False Denials*, 79 Child Development 914, 925 (2008).

Defendants are not left defenseless when a child fails to qualify as competent. Those who wish to confront the child in court can waive their objections to competency and ask for accommodations to make the child more comfortable. If the child still fails to qualify, defendants can argue to the jury that the child's prior statements are thus unreliable. Defendants also can highlight the dangers of suggestibility. For their part, jurors understand that young children have weaker memories and are more suggestible.[48] They are less likely to convict if defendants focus on potential influences by parents or others.[49]

B. It Will Also Improve The Quality Of Maltreatment Investigations

This case will also affect how states investigate allegations of maltreatment. A recognition that these disclosures are non-testimonial will enable states to continue improving their process for investigating child maltreatment. This, in turn, will enhance the reliability of such disclosures.

Many states employ trained interviewers to conduct videotaped interviews with children.[50] Videotaping has a number of advantages. It enables viewers to assess the exact words and tone of the interviewer and the child. It reduces the need for multiple parties to

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[48] Jodi A. Quas, et al., *Do Jurors "Know" What Isn't So About Child Witnesses?*, 29 L. & Hum. Behav. 425, 448 (2005).

[49] Stacia N. Stolzenberg & Thomas D. Lyon, *Evidence Summarized in Attorney's Closing Arguments Predicts Acquittals in Criminal Trials of Child Sexual Abuse*, 19 Child Maltreatment 119, 127 (2014).

[50] Myrna S. Raeder, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don't Die and Ways to Facilitate Child Testimony*, 16 Widener L. Rev. 239, 252 (2010).

interview the same child.[51] It also reduces the likelihood that repeated interviews will distort the child's memory.

These interviewers often use protocols such as interview instructions, promises to tell the truth, productive rapport building, and open-ended questions.[52] Such protocols reduce the likelihood of suggestion and make the interviews more effective.

Because videotaping and protocols make interviews more formal, however, they have led some courts to conclude that statements in these settings are testimonial.[53] This case provides an opportunity for the Court to offer guidance on this issue—particularly regarding the balancing of factors such as the child's perspective (for example, did the child recognize that the interview might be used as evidence) and the extent of police involvement (for example, did the police initiate the interview or prescribe the questions asked). A holding that young children's disclosures in these settings are non-testimonial would encourage states to continue improving their investigations through these methods.

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[51] Frank E. Vandervort, *Videotaping Investigative Interviews of Children in Cases of Child Sexual Abuse: One Community's Approach*, 96 J. Crim. L. & Criminology 1353, 1389–90 (2006).

[52] *See generally* Am. Prof'l Soc'y on the Abuse of Children, *Practice Guidelines: Forensic Interviewing in Cases of Suspected Child Abuse* (2012).

[53] John E.B. Myers, *Myers on Evidence of Interpersonal Violence, Child Maltreatment, Intimate Partner Violence, Rape, Stalking, And Elder Abuse* 874–76 (5th ed. 2012) (collecting cases).

CONCLUSION

For the reasons set forth above and in the brief of the Petitioner, the Court should reverse the decision of the Ohio Supreme Court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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STATE OF OHIO,

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v.

DARIUS CLARK,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Ohio

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QUESTIONS PRESENTED

1. Does an individual's obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?

2. Do a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

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INTEREST OF *AMICI CURIAE*[1]

Arizona Attorneys for Criminal Justice ("AACJ"), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal-defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training, and mutual assistance, and fostering public awareness of citizens' rights, the criminal-justice system, and the role of the defense lawyer.

The Connecticut Criminal Defense Lawyers Association ("CCDLA") is a not-for-profit organization of approximately three hundred lawyers who are dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA is the only statewide criminal-defense lawyers' organization in Connecticut. An affiliate of the National Association of Criminal Defense Lawyers, CCDLA works to improve the criminal-justice system by insuring that the individual rights guaranteed by the Connecticut and

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[1] Letters of blanket consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

United States Constitutions are applied fairly and equally and that those rights are not diminished.

The Iowa Association of Criminal Defense Lawyers ("IACDL"), the Iowa state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1992. IACDL is a statewide not-for-profit membership organization of criminal-defense lawyers, law students, and associated professionals dedicated to promoting the proper administration of criminal justice; protecting individual rights and improving criminal law, its practice, and procedures; and fostering, maintaining, and encouraging the integrity, independence, and expertise of the defense lawyer in criminal cases.

INTRODUCTION

Ohio asks the Court to create an exceptionally broad, nationwide rule that the Confrontation Clause does not apply to statements made to private parties not acting at the direction of law enforcement. Pet. Br. 10. The Court should decline to use such a blunt instrument to solve a case-specific problem that Ohio can address itself. The child victim-witness in this case is unavailable because of Ohio's witness-competency rules. Though the victim's inability to testify may affect what evidence is presentable at trial in this particular case – a prosecution where the government has ample evidence at its disposal as set forth in the brief of *amici* Fern and Charles Nesson – the solution to that state-law problem should not be to

make irrelevant to the Confrontation Clause a whole category of witness statements.

Outside Ohio, states are already solving the problem of child testimony in flexible and innovative ways that preserve the essential right of the accused to confront his accusers. *Amici* offer this brief to illustrate the legal and practical landscape in other states making it possible for children to testify in court. The Court need not set out a broad constitutional rule to address a witness-competency issue in Ohio. The desire for easier prosecutions in Ohio and elsewhere does not justify the costs Ohio's proposed rule would impose on the right to confrontation and the integrity of convictions.

SUMMARY OF THE ARGUMENT

The Confrontation Clause prohibits admission at trial of "testimonial" statements unless the witness is unavailable and there has been a "prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Ohio would have this Court exclude from the Confrontation Clause every statement a child-witness makes to a "private party" on the theory that a child's statement to a private party could not be testimonial. Pet. Br. 19. Ohio insists this should be the rule even though Ohio, like every other state, requires many private individuals to report to state authorities suspected child abuse, including suspicions that arise because of a child's verbal accusation. Notwithstanding an accused's right "to be

confronted with the witnesses against him," U.S. Const. amend. VI, when a child accuses a defendant of abuse or other egregious crime, Ohio argues that it is constitutionally irrelevant whether the child himself or some private-party proxy witness repeats that accusation at trial.

Instead, Ohio would have this Court limit the application of the Confrontation Clause to the contexts the Court listed in *Crawford* as being obviously testimonial – before grand juries, in prior court proceedings, or during police interrogations – and leave to state evidentiary rules the task of regulating when an alleged victim's hearsay accusation could be admitted to convict the accused. *See Crawford*, 541 U.S. at 68 (holding that "[w]hatever else the term [testimonial] covers, it applies at a minimum" to prior statements in court, before a grand jury, or during police interrogation). Pet. Br. 16-18. This suggested rule is inconsistent with the Confrontation Clause and this Court's decisions interpreting it.

Moreover, Ohio's preferred bright-line rule plainly sweeps too broadly. Every state in the nation has mandatory-reporting laws that require broad groups of individuals to report suspected child abuse on threat of criminal prosecution for failing to make a report. Unquestionably among these laws' purposes is to facilitate the discovery, investigation, and prosecution of crimes against children. The Court should not allow this powerful tool for protecting children and assisting in the prosecution of those who harm them to be turned into an incentive for prosecutors to introduce proxy testimony at criminal trials.

The issue in this case does not call out for a bright-line rule. Nor is this the case for the Court to resolve, for all cases, "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Davis v. Washington*, 547 U.S. 813, 823 n.2 (2006). Ohio's difficulty here derives from the fact that the child-witness was, under Ohio law, incapable of testifying, yet Ohio wants the jury to hear the child's accusations through some other witness. Whether or not the child-victim's statements in this specific instance are testimonial or not, the anomaly of the child's incompetence under Ohio law (and the desire to ensure a conviction in this particular case) should not justify the sweeping rule Ohio urges.

The purpose of this brief is to show that there are other solutions that do not sacrifice the right to confrontation in cases involving children-witnesses. In recent decades, states have developed ways to avoid the witness-incompetency problem Ohio has in this case. The experiences in other states, including Arizona, Connecticut, and Iowa, show that there can be accommodations made to facilitate child testimony. States are doing all sorts of things to deal with this problem in ways that do not involve abandoning the confrontation right when it comes to young witnesses. Constitutional protections of the accused are not costless, but prosecutions in these cases – and convictions – are still happening. The broad rule suggested by Ohio and some *amici curiae* is simply not necessary.

ARGUMENT

I. The Court should not adopt Ohio's over-inclusive proposed rule

Ohio asks this Court to hold that the statements of "a child too young to testify" made to "private parties without any police direction" are never subject to the Confrontation Clause, even when state law obligates the private party to report the statements to the government. Pet. Br. 11-12.

As ably explained in Respondent's merits brief, Ohio's proposed rule is inconsistent with the right to confront adverse witnesses. *See* Resp. Br. 22-33. Such a bright-line rule is particularly ill-suited to resolve confrontation questions in the context of mandatory reporters because some statements to mandatory reporters will be made with the "primary purpose" of "meet[ing] an ongoing emergency" and some "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. That is, some statements to mandatory reporters will be "testimonial" and some will not.

Ohio's suggested rule unjustifiably disregards the purpose of mandatory-reporting schemes. Every state has laws requiring professionals and others who frequently interact with children to report suspected abuse to government officials, including law enforcement in some states. *Mandatory Reporters of Child Abuse and Neglect*, U.S. Dep't of Health and Human Services, 1 (2014), https://www.childwelfare.gov/pubPDFs/manda.pdf. While it is true that a driving purpose

behind these requirements is to protect children, it is clear that one of the ways mandatory-reporting laws serve this purpose is by aiding the investigation and prosecution of crimes against children. *See, e.g.*, *Cross-Reporting Among Responders to Child Abuse and Neglect*, U.S. Dep't of Health and Human Services, 2 (2012), https://www.childwelfare.gov/pubPDFs/xreporting.pdf (noting that a majority of states require that serious mandatory reports be cross-reported to law-enforcement agencies for investigation). The reporting schemes were "designed to spur casefinding. Their purpose is to throw a spotlight on situations which may require protective services, juvenile court adjudication, or criminal prosecution." Monrad G. Paulsen, *The Legal Framework for Child Protection*, 66 Colum. L. Rev. 679, 716 (1966).

Mandatory-reporting laws are a state-developed system to convert typical recipients of information into conduits of information for the government's use, including for criminal investigations and prosecutions. Given that one purpose of mandatory-reporting laws is to assist in criminal investigations and prosecutions, adopting Ohio's proposed bright-line rule would violate "[t]he purpose of enshrining this [confrontation] protection in the Constitution," namely "to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." *Maryland v. Craig*, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting).

Ohio's proposed rule would remove from the protections of confrontation and cross-examination every statement a child makes to these individuals, who are compelled by threat of criminal prosecution to make reports with details that will assist in the investigation and prosecution of crimes. That result would risk "depriving criminal defendants of the benefit of the adversary process" with respect to the principal complaining witness. *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment); *see also Davis*, 547 U.S. at 838 (Thomas, J., concurring in the judgment in part and dissenting in part) ("even if the interrogation itself is not formal, the production of evidence by the prosecution at trial would resemble the abuses targeted by the Confrontation Clause if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation") (citing *Coy v. Iowa*, 487 U.S. 1012 (1988)); *Craig*, 497 U.S. at 845 ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.").

Indeed, this Court's earlier decisions indicate that the Confrontation Clause applies in full force to child testimony:

> The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses. That face-to-face presence may, unfortunately,

> upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.

Coy, 487 U.S. at 1020; *see also Craig*, 497 U.S. at 853 ("a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, ***at least in some cases***, a defendant's right to face his or her accusers in court" (emphasis added)).

As the experiences in Arizona, Connecticut, and Iowa illustrate, an overarching policy of protecting children-witnesses from the trauma of testifying in court is not weighty enough to gut the right to confrontation in the way that Ohio suggests. *See Coy*, 487 U.S. at 1021 ("something more than the type of generalized finding underlying such a statute is needed when the exception [to confrontation] is not firmly rooted in our jurisprudence.") (citations and internal quotation marks omitted). The Court should not now, on Ohio's suggestion, remove this entire category of witnesses from the protections of the Confrontation Clause.

II. The experiences in other states show that children can testify in criminal trials with accommodations in appropriate cases

Amici acknowledge that crimes against children can be difficult to prosecute for a number of reasons, many of which also apply to other kinds of crimes.

But the difficulty in prosecuting crimes should not motivate the Court to deteriorate a constitutional right: "It is a truism that constitutional protections have costs." *Coy*, 487 U.S. at 1020.

Aside from being wrong, Ohio's blanket rule excluding an entire category of victim statements as irrelevant to the confrontation right is simply unnecessary. Although the child-witness in this particular case was incompetent to testify under Ohio law, the Court should avoid setting an inflexible bright-line rule carving out of the Constitution statements made to individuals required by state law to report child abuse.

Ohio's evidence rules presume that children under ten are incompetent to testify. Ohio R. Evid. 601(A). Members of *amici curiae* AACJ, CCDLA, and IACDL practice in three states with very different rules for witness competency than Ohio has. The experiences in these states and elsewhere show that states can provide protections and accommodations for children-witnesses, in appropriate cases, making it possible for children to testify in less uncomfortable settings, while at the same time preserving a criminal defendant's right to confront his accusers. *See Craig*, 497 U.S. at 853 (this Court noting a quarter century ago that thirty-seven states permitted videotaped testimony, twenty-four allowed one-way closed circuit, and eight allowed two-way systems). Prosecutions and convictions can and do happen in these states, with testimony from children-victims and even without such testimony.

The Court should take into account the states' experiences with these accommodations when deciding how the Confrontation Clause applies in this case and others involving children-witnesses.

A. The experience in Arizona

1. Arizona gives trial judges "practically unlimited" discretion to determine the competency of children-witnesses

Unlike in Ohio, the default rule in Arizona is that "[i]n any criminal trial every person is competent to be a witness." Ariz. Rev. Stat. § 13-4061; *see also* Ariz. R. Evid. 601 ("Every person is competent to be a witness unless these rules or an applicable statute provides otherwise.").

Before the enactment of section 13-4061, Arizona courts had developed a flexible approach to witness competency that accorded substantial discretion to trial courts. In *Donnelley v. Territory*, 52 P. 368, 370-71 (Ariz. 1898), the Arizona territorial court held that the trial court improperly allowed the testimony of a seven-year-old boy where the record did not reflect an understanding of "the nature of an oath and the consequences of falsehood." But the court explained that "[t]here is no precise age at which children are competent or incompetent." *Id.* The court gave the rule, "A child produced as a witness, who understands that he is brought into court to tell the truth, and that it is wrong to tell a lie, has sufficient understanding of an oath to be competent." *Id. See*

also Keefe v. State, 72 P.2d 425, 428 (Ariz. 1937) (reversing conviction and directing court on remand to find six-year-old boy competent to testify based on his understanding of the oath that was reflected in the record).

Arizona's modern test for competency was established in *Litzkuhn v. Clark*, 339 P.2d 389 (Ariz. 1959), where the Arizona Supreme Court held that the trial court could not refuse to allow a five-year-old girl to testify without a preliminary voir dire examination as to her competency to testify. The next year, the court held that a trial court properly found an eight-year-old girl competent to testify based on a thorough voir dire examination. *State v. Dominguez*, 348 P.2d 919 (Ariz. 1960). In the following years, the Arizona Supreme Court found no error in trial courts' permitting young children to testify. *See, e.g.*, *State v. Berry*, 419 P.2d 337 (Ariz. 1966) (six-year-old girl testified about molestation); *State v. Goldsmith*, 450 P.2d 684 (Ariz. 1969) (five-year-old girl testified about sodomy); *State v. Jerousek*, 590 P.2d 1366 (Ariz. 1979) (eight-year-old child competent to testify); *State v. Ault*, 724 P.2d 545, 553-54 (Ariz. 1986) (six-year-old testified through interpreter after trial court conducted voir dire examination and determined competency).

The court reasoned that "proof that an eight year old child is incapable of formulating an abstract definition of truth aids us very little in determining whether that child has an intuitive grasp of the difference between truth and falsehood." *State v. Pittman*, 574 P.2d 1290, 1295 (Ariz. 1978). In *State v.*

Bowie, 580 P.2d 1190, 1195 (Ariz. 1978), not only were children aged six and seven years properly qualified as competent to testify, but the court held that the prosecutor had a good-faith basis for believing a four-year-old boy would be competent under the specific facts of that case.

The Arizona Court of Appeals, in reviewing this history, noted, "More recent authority reveals a more relaxed approach [for determining competency] [T]he trial court's discretion in determining a child's competency is practically unlimited." *State v. Melendez*, 661 P.2d 654, 658 (Ariz. Ct. App. 1982). Even the combination of youth and intellectual disability will not bar a witness from testifying, although the party opposing the witness's competency may raise those concerns through cross-examination and contrary evidence. *State v. Roberts*, 677 P.2d 280 (Ariz. Ct. App. 1984).

In 1985, Arizona's legislature enacted section 13-4061, which presumes "every person is competent to be a witness" in "any criminal trial." As a result, it was "no longer mandatory" for courts to make "a competency determination for children under the age of ten years." *State v. Superior Court*, 719 P.2d 283, 286 (Ariz. Ct. App. 1986) (holding three-year-old was competent to testify). Although particular witnesses could be challenged on competency grounds, by 1985 Arizona law removed "artificial bases for disqualifying a witness as incompetent." *Id.* "The fact of the extreme youth of the witness," and problems with the accuracy and consistency of child testimony "are

matters to be considered by the jury in connection with her credibility and the weight which should be given to her testimony, but do not affect competency." *Id.* at 286. *See also Escobar v. Superior Court*, 746 P.2d 39, 43 (Ariz. Ct. App. 1987) (holding prosecutor should not have refused grand jury's request to produce testimony from child who was two-and-a-half because it was for the jury not the prosecutor to "judge his competency and credibility").

For the last thirty years, Arizona law has been that all witnesses who are called by a party are presumed competent, regardless of age, mental capability, mental illness, or any other factor which may affect the ability to testify in court. A party opposing the competency of the witness must challenge it before the witness testifies in front of the jury. Arizona law now trusts in the "crucible" of cross-examination to allow the jury to weigh the credibility, consistency, and weight of child testimony. Now, attorneys rarely challenge a witness's competency because the law is so well settled that small children may testify and that cross-examination is the means to challenge the witness's ability to perceive and relay events.

2. Arizona has made accommodations to allow children-witnesses to testify comfortably

Not coincidentally, at the same time the Arizona Legislature modified the rule for witness competency in criminal cases, it also enacted statutes designed

to limit the ability of defendants to put children-witnesses at unease.

Although some of those statutes fell to state constitutional challenges unrelated to confrontation, one that survives is Arizona Revised Statutes section 13-4253, which allows children to testify by closed-circuit television from a different room apart from where the defendant, judge, and jury sit. Consistent with this Court's decisions in *Coy*, 487 U.S. 1012, and *Craig*, 497 U.S. 836, Arizona courts have approved such accommodations so long as there is a case-specific finding that an accommodation (such as video testimony) is necessary. *See State v. Vincent*, 768 P.2d 150, 160 (Ariz. 1989) (holding section 13-4253 facially constitutional but unconstitutionally applied when the state relied on only "generalized assertion that any minor child" forced to testify "would be traumatized by a face-to-face encounter"); *State v. Vess*, 756 P.2d 333, 335 (Ariz. Ct. App. 1988) (requiring a showing of witness-specific "particularized need" to allow testimony to be taken via closed-circuit transmission from another room).

Arizona is also pioneering other accommodations, such as the use of a "courthouse dog." The Pima County Attorney's Office has recently introduced a golden retriever named Russell to accompany children-victims and witnesses to the courthouse and the Child Advocacy Center (a child-friendly environment for conducting video-recorded interviews and physical examinations). Pima County Bar Association, *The Writ*, November 2012, p.5, *see* Appendix B. Likewise,

the Victim Services Division of the Maricopa County Attorney's Office uses a service dog, Sam, to "provide[ ] the support needed for these [young victims] to successfully attend court and confront their perpetrator." Maricopa County Attorney's Office K-9 Victim Support Program, http://www.maricopacountyattorney.org/serving-victims/k9-vsp/. This type of program originated in Washington and has withstood challenges in that state. *State v. Dye*, 283 P.3d 1130, 1132-34 (Wash. Ct. App. 2012) ("facility dog" accompanied mentally handicapped victim to witness stand; no interference with confrontation rights under *Coy*, no prosecutorial misconduct by making gift to witness, and no abuse of discretion of trial court which has discretion to control courtroom proceedings). The Maricopa County Attorney's Office's Victim Services Division also offers a "Kids In Court" program to help children prepare to give testimony in court, including providing tips such as how to ask for a break, teaching relaxation techniques, and allowing children to visit a courtroom and practice testimony through role playing. Maricopa County Attorney's Office, Victim Services Division, Kids In Court, http://www.maricopacountyattorney.org/pdfs/victim-services/Kids-in-Court.pdf.

B. The experience in Connecticut

Similarly, Connecticut, by statute, evidence rules, and case law, has designed and implemented procedures allowing a child-victim to provide personal, non-hearsay testimony in a manner that protects

both the child's wellbeing and the constitutional rights of the accused.

By statute, the default rule in Connecticut is that "[n]o witness shall be automatically adjudged incompetent to testify because of age." Conn. Gen. Stat. § 54-86h. Thus, although a court may determine that a witness is incompetent because, for example, the witness is "incapable of understanding the duty to tell the truth" or is incapable "of expressing himself or herself in a manner which can be understood," the witness's age cannot be the basis of the court's determination. *See* Conn. Code Evid. 6-3. And in cases where the witness is a "child who is a victim of assault, sexual assault or abuse," Connecticut law declares that the child "shall be competent to testify without prior qualification." Conn. Gen. Stat. § 54-86h.

Similar to Arizona, Connecticut law, in appropriate cases, provides for numerous accommodations for child testimony. For instance, a Connecticut statute permits a child under twelve to testify in a room other than the courtroom, to be televised by closed-circuit equipment in the courtroom or recorded for later showing before the court. Conn. Gen. Stat. § 54-86g(a). Furthermore, Connecticut has also established procedures to ease the process of in-court testimony. *See* Conn. Gen. Stat. § 54-86g(b). In cases involving physical or sexual abuse of a child under twelve, a court has discretion to, among other things: (1) limit who can "enter[ ] and leav[e] the courtroom during the child's testimony"; (2) allow "an adult who

is known to the child and with whom the child feels comfortable" to sit next to the child; and (3) require questioning attorneys to sit "at a table positioned in front of the child" and "remain seated." *Id.*

Connecticut case law directs courts to implement these accommodations in a manner designed to both facilitate testimony from children-victims and preserve the constitutional rights of the accused. *See State v. Jarzbek*, 529 A.2d 1245, 1255 (Conn. 1987) (rejecting per se rule allowing videotaped testimony and holding that state may "in particular circumstances establish[ ] a compelling need to have a minor victim of tender years testify outside the physical presence of his or her alleged sexual assaulter"); *State v. Marquis*, 699 A.2d 893, 900-01 (Conn. 1997) (holding that defendant's expert may examine child to rebut prosecution's effort to establish need for videotaped testimony under *Jarzbek*).

C. The experience in Iowa

1. Children in Iowa are presumed competent to testify

Iowa courts presume that children are competent to testify. *State v. Andrews*, 447 N.W.2d 118, 120 (Iowa 1989). If a child's competency to testify is challenged, the court considers whether the child (1) "is mentally capable of understanding the questions"; (2) "is able to formulate intelligent answers and communicate impressions regarding the incident"; and (3) "can understand the responsibility to tell the

truth." *State v. Brotherton*, 384 N.W.2d 375, 377 (Iowa 1986). The trial court has "broad discretion on issues surrounding determination of witness competency" and is reversed only "on a showing the trial court's ruling is clearly untenable and without reason." *State v. Dodson*, 452 N.W.2d 610, 611 (Iowa Ct. App. 1989).

Iowa's three factors for determining a child's competency to testify derive from the Iowa Supreme Court's application of Iowa's rules of evidence and criminal procedure. The Iowa Rules of Criminal Procedure incorporate the rules for determining witness competency in civil actions, Iowa R. Crim. P. 2.20(1), and the Iowa Rules of Evidence state that "[u]nless otherwise provided by statute or rule, every person is competent to be a witness." Iowa R. Evid. 5.601. The Iowa Supreme Court has further clarified that the determination of a witness's competency to testify has two aspects: "(1) the mental capacity to understand the nature of the questions put and to form and communicate intelligent answers thereto and (2) the moral responsibility to speak the truth, which is the essence of the nature and obligation of an oath." *State v. Harvey*, 242 N.W.2d. 330, 336 (Iowa 1976).

Iowa's presumption of competence is deeply rooted in Iowa's judicial system. The very first Iowa Constitution granted litigants the right to "use as a witness, or take the testimony of, any other person not disqualified on account of interest." Iowa Const. of 1857, art. I § 4. Similarly, the earliest Iowa evidence codes allowed the testimony of anyone who could appreciate the obligations of an oath. Iowa Code § 3978

(1860). Iowa's commitment to the court's right to hear every person's testimony has consistently run through Iowa cases for one hundred and fifty years. *See, e.g.*, *State v. King*, 91 N.W. 768 (Iowa 1902) (rejecting the "ancient" presumption of incompetency and stating that no presumption exists for children under age fourteen); *State v. Meyer*, 113 N.W. 322 (Iowa 1907) (trial court did not abuse its discretion when it allowed six-year-old child to testify about assault she had endured).

In 1981, the Iowa Legislature repealed the successor to Iowa Code section 3978 and replaced it with the Iowa Rules of Evidence. Those rules of evidence stated that "every person of sufficient capacity to understand the obligation of the oath" was competent. Iowa R. Evid. 5.601 (1981). The Iowa Supreme Court observed that the repeal did not change the standard that has historically existed in Iowa: children are presumed competent to testify. *State v. Van Hoff*, 371 N.W.2d 180, 183 n.1 (Iowa 1985). Indeed, to ensure that Iowa's rules of evidence continue to preserve the state's historical presumption of competency, Iowa Rule of Evidence 601 was expressly amended in 1985 to state that a child – defined as a person under the age of fourteen – was "presumed to be competent." Iowa R. Evid. 5.601 (1985). That rule was again amended in 1990 to more closely conform to the federal model. *See* 7 Laurie Kratky Doré, *Iowa Practice Series – Evidence*, § 5.601:1 (2014). According to the current Iowa Rule of Evidence 5.601, "[u]nless

otherwise provided by statute or rule, every person is competent to be a witness."

The very earliest reported cases in Iowa document the importance Iowa courts have placed on children's sworn testimony. For example, in *State v. Meyer*, the prosecution relied on a six-year-old child to testify about an assault. 113 N.W. at 322. Although the child could not define the words "oath" or "testimony," this was "not determinative of her capacity" because having "an adequate sense of the impropriety of falsehood [showed] she understood the nature of an oath, even though not able to state what those words meant." *Id.* at 323 (citations omitted). In affirming the defendant's conviction, the Iowa Supreme Court observed that to exclude the testimony of children-witnesses "would deprive them of the adequate protection of the law, for in cases wherein assault is charged conviction is ordinarily impossible without the aid of their evidence." *Id.* at 324.

As one would expect from this view of the competency of children, Iowa courts have consistently affirmed the admission of testimony of children, often of a tender age. *See, e.g.*, *State v. Brotherton*, 384 N.W.2d at 377-78 (four years old); *State v. Dodson*, 452 N.W.2d at 611 (five years old); *State v. Lusch*, No. 07-0491, 2008 WL 2514746, at *1 (Iowa Ct. App. 2008) (unpublished) (six years old); *State v. Paulsen*, 265 N.W.2d 581, 585-86 (Iowa 1978) (six years old); *State v. Van Hoff*, 371 N.W.2d at 183-84 (eight years old); *State v. Swanson*, 228 N.W.2d 101, 103 (Iowa 1975) (eight years old); *State v. Cartee*, 202 N.W.2d

93, 95-96 (Iowa 1972) (eight years old); *State v. Olson*, 149 N.W.2d 132, 134-35 (Iowa 1967) (eight years old); *State v. Hackett*, 200 N.W.2d 493, 493-94 (Iowa 1972) (ten and twelve years old); *State v. Whitfield*, 315 N.W.2d 753, 754-55 (Iowa 1982) (thirteen years old).

Consequently, Iowa joins Connecticut and Arizona in rejecting the kind of age-determinative presumption still used in Ohio. The Iowa approach represents a well-considered and well-developed set of rules that emphasize that litigants, courts, and witnesses all are entitled to the testimony of every person. It avoids the hyper-technical distinctions made under Ohio law.

2. Iowa's procedures protect the defendant's constitutional rights and the interest of the government in presenting evidence in criminal cases while also safeguarding children

With children presumed competent to testify under Iowa law, procedures in Iowa courts safeguard children-witnesses while also protecting defendants' constitutional rights. Pursuant to this Court's decisions in *Coy* and *Craig*, Iowa courts hold evidentiary hearings to make case-specific findings regarding trauma to children-victims before allowing children to testify via close-circuit television. *See, e.g.*, *Lomholt v. Iowa*, 327 F.3d 748, 756 (8th Cir. 2003) (affirming Iowa state court conviction where four-year-old and

five-year-old children provided sequestered, closed-circuit testimony).

The Iowa Legislature has codified the case-specific procedure discussed in *Craig* through Iowa Code section 915.38. Section 915.38 specifies that "[u]pon its own motion or upon motion of any party," the court may "protect a minor from trauma caused by testifying in the physical presence of the defendant where it would impair the minor's ability to communicate, by ordering that the testimony of the minor be taken in a room other than the courtroom and be televised by closed-circuit equipment for viewing in the courtroom." Iowa Code § 915.38(1)(a). In addition to requiring that the trial court make specific findings about the trauma that the child would experience if forced to testify in open court, section 915.38 contains additional "strict requirements" for the court to follow. *See, e.g.*, *State v. Shearon*, 660 N.W.2d 52, 54 (Iowa 2003) (discussing 1999 version of section 915.38(a)). Those strict requirements include the judge informing the child that the defendant will not be present in the room where the child is testifying but that the defendant will be able to view the child's testimony through closed-circuit television. *See* Iowa Code § 915.38(1)(a). Also under those requirements, the defendant remains in the courtroom while the defendant's counsel is present in the room where the child is testifying, but the defendant must be able to communicate effectively with his counsel by appropriate electronic methods. *See* Iowa Code § 915.38(1)(b).

While ensuring that trial courts comply with the strict requirements of section 915.38 and *Craig* before allowing a child to testify remotely, the Iowa Supreme Court has carefully preserved the core constitutional principles at stake. As recently as October 2014, the Iowa Supreme Court underscored *Craig*'s observation that "face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person." *State v. Rogerson*, 855 N.W.2d 495, 504 (Iowa 2014) (quoting *Craig*, 497 U.S. at 846) (internal quotation marks omitted). The Iowa Supreme Court also emphasized that "[r]emote testimony of any kind should not be lightly substituted in its place." *Id.* at 505. Through section 915.38's strict requirements and through Iowa courts' reluctance to allow children-witnesses to testify remotely unless absolutely necessary, Iowa courts strive to safeguard a child-witness that is competent to testify at the same time that they strive to protect the defendant's constitutional rights to confrontation and to the assistance of counsel.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to decline Ohio's invitation to impose a nationwide rule holding that a witness's accusations could never be subject to the Confrontation Clause if they are made to a private party. Ohio has itself created the

problem it faces in this case. Diminishing the right to confront adverse witnesses is not the cure.

Respectfully submitted,

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APPENDIX A

PERTINENT STATE STATUTES – EXCERPTS

Arizona

Ariz. Rev. Stat. § 13-4061 – Competency of witness

In any criminal trial every person is competent to be a witness.

Ariz. Rev. Stat. § 13-4253 – Out of court testimony; televised; recorded

A. The court, on motion of the prosecution, may order that the testimony of the minor be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment and any person whose presence would contribute to the welfare and well-being of the minor may be present in the room with the minor during his testimony. Only the attorneys may question the minor. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the minor during his testimony but does not permit the minor to see or hear them. The court shall permit the defendant to observe and hear the testimony of the minor in person but shall ensure that the minor cannot hear or see the defendant.

B. The court, on motion of the prosecution, may order that the testimony of the minor be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection A may be present during the taking of the minor's testimony, and the persons operating the equipment shall be confined from the minor's sight and hearing as provided by subsection A. The court shall permit the defendant to observe and hear the testimony of the minor in person but shall ensure that the minor cannot hear or see the defendant. The court shall also ensure that:

1. The recording is both visual and aural and is recorded on film or videotape or by other electronic means.

2. The recording equipment was capable of making an accurate recording, the operator was competent and the recording is accurate and is not altered.

3. Each voice on the recording is identified.

4. Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

C. If the court orders the testimony of a minor to be taken pursuant to this section, the minor shall not be required to testify in court at the proceeding for which the testimony was taken.

Connecticut

Conn. Gen. Stat. § 54-86g – Testimony of victim of child abuse. Court may order testimony taken outside courtroom. Procedure.

(a) In any criminal prosecution of an offense involving assault, sexual assault or abuse of a child twelve years of age or younger, the court may, upon motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom in the presence and under the supervision of the trial judge hearing the matter and be televised by closed circuit equipment in the courtroom or recorded for later showing before the court. Only the judge, the defendant, the attorneys for the defendant and for the state, persons necessary to operate the equipment and any person who would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony, except that the court may order the defendant excluded from the room or screened from the sight and hearing of the child only if the state proves, by clear and convincing evidence, that the child would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that a compelling need exists to take the testimony of the child outside the physical presence of the defendant in order to insure the reliability of such testimony. If the defendant is excluded from the room or screened from the sight and hearing of the child, the court shall ensure that the defendant is able to observe and hear the testimony of the child, but that the child cannot see or hear the defendant. The

defendant shall be able to consult privately with his attorney at all times during the taking of the testimony. The attorneys and the judge may question the child. If the court orders the testimony of a child to be taken under this subsection, the child shall not be required to testify in court at the proceeding for which the testimony was taken.

(b) In any criminal prosecution of an offense involving assault, sexual assault or abuse of a child twelve years of age or younger, the court may, upon motion of the attorney for any party, order that the following procedures be used when the testimony of the child is taken: (1) Persons shall be prohibited from entering and leaving the courtroom during the child's testimony; (2) an adult who is known to the child and with whom the child feels comfortable shall be permitted to sit in close proximity to the child during the child's testimony, provided such person shall not obscure the child from the view of the defendant or the trier of fact; (3) the use of anatomically correct dolls by the child shall be permitted; and (4) the attorneys for the defendant and for the state shall question the child while seated at a table positioned in front of the child, shall remain seated while posing objections and shall ask questions and pose objections in a manner which is not intimidating to the child.

Conn. Gen. Stat. § 54-86h – Competency of child as witness

No witness shall be automatically adjudged incompetent to testify because of age and any child who is a victim of assault, sexual assault or abuse shall be competent to testify without prior qualification. The weight to be given the evidence and the credibility of the witness shall be for the determination of the trier of fact.

Conn. Code Evid. 6-3 – Incompetencies

(a) **Incapable of understanding the duty to tell the truth.** A person may not testify if the court finds the person incapable of understanding the duty to tell the truth, or if the person refuses to testify truthfully.

(b) **Incapable of sensing, remembering or expressing oneself.** A person may not testify if the court finds the person incapable of receiving correct sensory impressions, or of remembering such impressions, or of expressing himself or herself concerning the matter so as to be understood by the trier of fact either directly or through interpretation by one who can understand the person.

Iowa

Iowa Code § 3978 (1860)

Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, both civil and criminal, except as herein otherwise declared.

Iowa Code § 915.38 – Televised, videotaped, and recorded evidence – limited court testimony – minors and others

1. a. Upon its own motion or upon motion of any party, a court may protect a minor, as defined in section 599.1, from trauma caused by testifying in the physical presence of the defendant where it would impair the minor's ability to communicate, by ordering that the testimony of the minor be taken in a room other than the courtroom and be televised by closed-circuit equipment for viewing in the courtroom. However, such an order shall be entered only upon a specific finding by the court that such measures are necessary to protect the minor from trauma. Only the judge, prosecuting attorney, defendant's attorney, persons necessary to operate the equipment, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the minor may be present in the room with the minor during the minor's testimony. The judge shall inform the minor that the defendant will not be present in the room in which the minor will be testifying but

that the defendant will be viewing the minor's testimony through closed-circuit television.

b. During the minor's testimony the defendant shall remain in the courtroom and shall be allowed to communicate with the defendant's counsel in the room where the minor is testifying by an appropriate electronic method.

c. In addition, upon a finding of necessity, the court may allow the testimony of a victim or witness with a mental illness, an intellectual disability, or other developmental disability to be taken as provided in this subsection, regardless of the age of the victim or witness.

2. The court may, upon its own motion or upon motion of a party, order that the testimony of a minor, as defined in section 599.1, be taken by recorded deposition for use at trial, pursuant to rule of criminal procedure 2.13(2)(b). In addition to requiring that such testimony be recorded by stenographic means, the court may on motion and hearing, and upon a finding that the minor is unavailable as provided in rule of evidence 5.804(a), order the videotaping of the minor's testimony for viewing in the courtroom by the court. The videotaping shall comply with the provisions of rule of criminal procedure 2.13(2)(b), and shall be admissible as evidence in the trial. In addition, upon a finding of necessity, the court may allow the testimony of a victim or witness with a mental illness, an intellectual disability, or other developmental disability to be taken as provided in this

subsection, regardless of the age of the victim or witness.

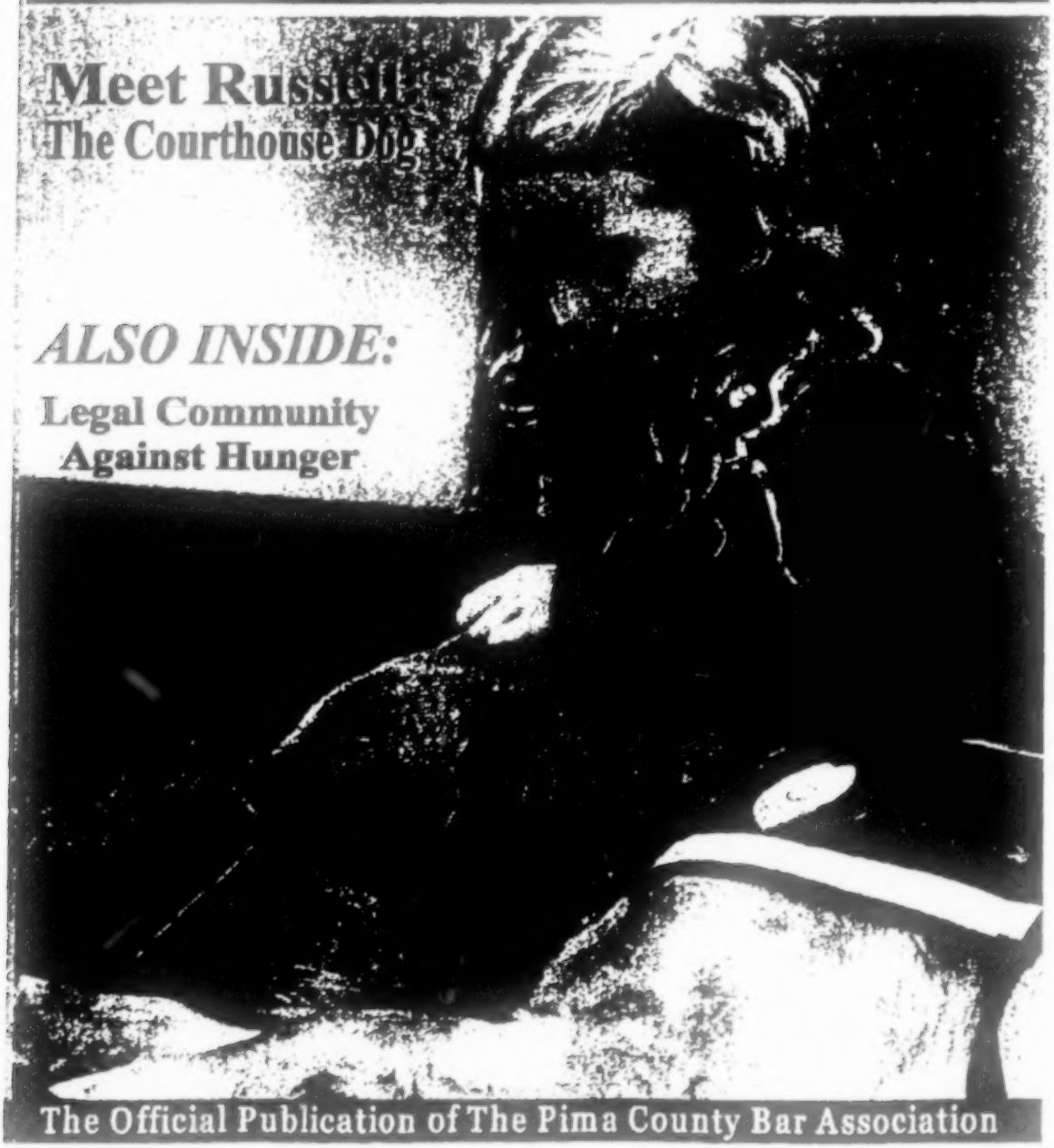
3. The court may upon motion of a party admit into evidence the recorded statements of a child, as defined in section 702.5, describing sexual contact performed with or on the child, not otherwise admissible in evidence by statute or court rule if the court determines that the recorded statements substantially comport with the requirements for admission under rule of evidence 5.803(24) or 5.804(b)(5).

4. A court may, upon its own motion or upon the motion of a party, order the court testimony of a child to be limited in duration in accordance with the developmental maturity of the child. The court may consider or hear expert testimony in order to determine the appropriate limitation on the duration of a child's testimony. However, the court shall, upon motion, limit the duration of a child's uninterrupted testimony to one hour, at which time the court shall allow the child to rest before continuing to testify.

$3.00

The Writ

Volume 31, No. 11 November 2012



Meet Russell: The Courthouse Dog

ALSO INSIDE:

Legal Community Against Hunger

The Official Publication of The Pima County Bar Association

Russell, The Courthouse Dog

By Linda Drake,
Special Staff Assistant to the Pima County Attorney

Russell, Golden Retriever

The Victim Services Division of the Pima County Attorney's Office has just welcomed its first four-legged staffer – Russell, a two-year-old golden retriever and highly trained, certified, professional courthouse dog.

Pima County Attorney Barbara LaWall was inspired by a presentation at a national prosecutors' meeting in 2011 to bring the innovative Courthouse Dog program to Tucson. She asked Kent Burbank, Director of

the Victim Services Division, if he could make it happen. Their primary goal: to help abused and neglected children, especially young victims of sexual abuse, through the criminal justice process. "Despite the progress we have made in how the criminal justice system treats children," LaWall says, "it is still tremendously difficult for some children to talk about horrific things they have seen or experienced." And that's where Russell comes in.

Career prosecutor Ellen O'Neill-Stephens founded the Courthouse Dogs program in Seattle in 2004 after fortuitously discovering the beneficial effect a well-trained dog could have on court proceedings. In 2003 she occasionally took her disabled son's service dog with her to juvenile court and noticed how markedly Jeeter's calming presence lowered tensions in the room. A colleague learned of her experience and asked if he could introduce Jeeter to two young victims, twin girls unable to talk about being molested by their father. In Jeeter's presence, the girls eventually relaxed enough to tell their stories.

In Tucson, Russell will perform the majority of his duties at the Southern Arizona Children's Advocacy Center, lending much-needed emotional support to traumatized children. Kathy Rau, a retired police lieutenant, forensic interviewer, and the Executive Director of SACAC, is Russell's new primary handler. She expects Russell will attend most of the forensic interviews conducted at the Center, comforting distraught or reticent children during an acutely stressful time. Those initial interviews will also help

identify which children may need Russell to accompany them throughout the criminal justice process, including trial.

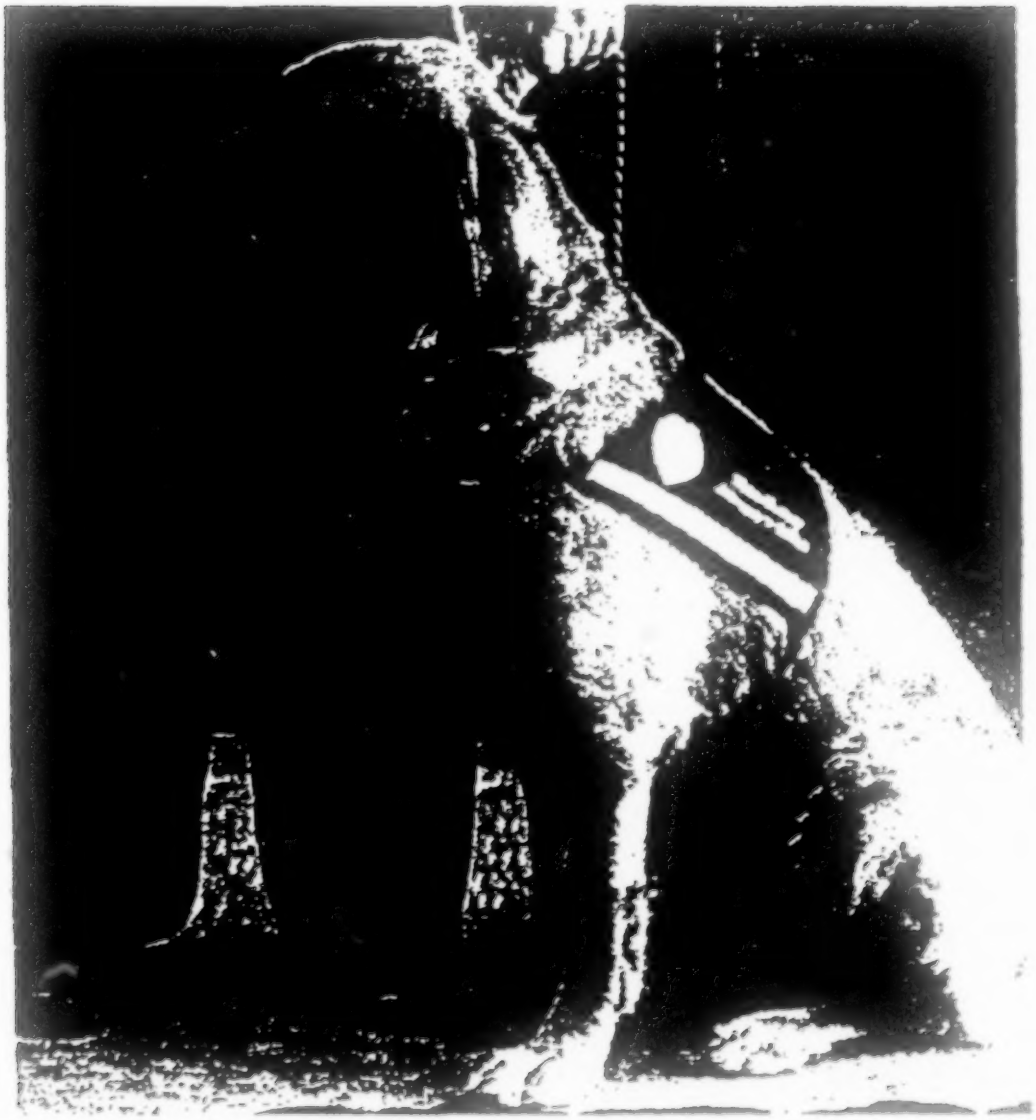
Russell was raised and trained in Santa Fe by Assistance Dogs of the West, an accredited member of Assistance Dogs International. He responds to more than 80 verbal cues, and does so – as required for his certification – at least 90% of the time on the "first ask." Jill Felice, founder of ADW, says that, while the extensive training the dogs receive is obviously vital, "a dog's innate temperament is equally important" for a successful courthouse dog.

Ideal candidates are exceptionally gentle and remarkably nonreactive to stressful events in the environment; they must remain calm no matter what happens around them. They must be highly sociable and want to engage with humans, yet be patient, unobtrusive, and able to remain still (and tolerate petting) for extended periods. They need to be confident, resilient, and amenable to different handlers, different environments, and many different kinds of people. Not surprisingly, dogs possessing all of these saintly traits are rare indeed, but Russell is one such dog. He is, Felice says, truly exceptional and "a perfect dog for the tasks he will perform in Tucson."

Since 2004, O'Neill-Stephens has helped place 18 courthouse dogs in 35 different jurisdictions and been gratified by a Washington appellate court decision upholding their use at trial. She is passionate about the important, "legally neutral" role the dogs can play

in the criminal justice system. "If a traumatized victim or witness cannot provide the basic facts necessary to investigate and prosecute a crime, clearly justice is not served," she says. Because courthouse dogs can silently support the fact-finding process without intruding into it, they "facilitate the search for truth and justice that is the foremost duty of a prosecutor."

Ellen O'Neill-Stephens, the founder of Courthouse Dogs, at the October 25, 2012 Press Conference.



Russell, certified, professional Courthouse Dog.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
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No. 13-1352

In The Supreme Court of the United States

STATE OF OHIO, PETITIONER,
v.

DARIUS CLARK, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF SOUTHWESTERN LAW STUDENT BERNADETTE M. BOLAN, AND PROFESSORS NORMAN M. GARLAND AND MICHAEL M. EPSTEIN, IN ASSOCIATION WITH THE AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL, AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Respondent. Norman M. Garland is a professor of law at Southwestern Law School. He teaches Evidence, Constitutional Criminal Procedure, Trial Advocacy, and Advanced Criminal Procedure. He writes about Evidence and Criminal Procedure. Michael M. Epstein is a professor of law and the Director of the pro bono Amicus Project at Southwestern Law School. Amicus Bernadette M. Bolan is an upper-division J.D. candidate at Southwestern Law School with extensive academic and professional interest in Constitutional Law.

Amici have neither interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in the Court's interpretation of the Confrontation Clause.

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[1] All parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amici curiae*.) Otherwise, no person or entity other than the *amici curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. This brief was researched and prepared in the Amicus Project Practicum at Southwestern Law School.

SUMMARY OF THE ARGUMENT

This brief assumes that individuals required to report suspected abuse to law enforcement serve as state actors for the purposes of the Confrontation Clause. The focus, accordingly, is the second question the Court certified when it granted certiorari in this case: do a child's out-of-court statements to a teacher in response to the teacher's questions about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

A conversation between a teacher and her student differs significantly from formal interrogation by law enforcement officers, which is most indicative of an exchange that results in testimonial statements under this Court's Confrontation Clause jurisprudence. Yet, formality is not the touchstone of testimonial statements and a declarant may make testimonial statements without interrogation. Other factors should and may be determinative under the primary purpose test.

Where the declarant is a young child and the questioner is a public school teacher with a statutorily mandated duty to report child abuse, a one-sided primary purpose test is ill-suited. Especially when the intent of the participants conflict, or are not easily ascertained, the primary purpose test must give weight to the perspective of both the declarant and the questioner. And when the relevant circumstances objectively show that the declarant's statements could "potentially [be] relevant to later criminal prosecution," such statements should be deemed testimonial. *Davis v.*

Washington, 547 U.S. 813, 822 (2006). Isolating the questioner's or the declarant's point of view produces neither a fair nor a logical result under such a test.

The relevant circumstances in this case indicate that an objective witness would know that L.P.'s statements to his teachers could and would be used for later criminal investigation and prosecution. This conclusion does not threaten the ability to prosecute child abuse or domestic violence cases; Ohio's rules of evidence do.

A trial court's determination that a person is incompetent to be a witness cannot defeat an accused's confrontation rights. Some states' competency rules stand in the way of resolving this problem, as Ohio's did in this case. Protective measures exist to facilitate child and abuse victim testimony when such potential witnesses have problems that arguably prevent them from coming to court. These measures include providing alternative settings and amending competency rules to permit even very young child victims and adults with problems to testify. Amending and utilizing existing state laws to accommodate children and abuse victims provides prosecutors with the ability to use such witnesses' statements, while upholding an accused's constitutional rights.

ARGUMENT

I. UNDER THE PRIMARY PURPOSE TEST OF CRAWFORD AND ITS PROGENY, L.P.'S STATEMENTS WERE TESTIMONIAL

Assuming, *arguendo*, that a child's statements to a public school teacher with a statutorily mandated duty to report abuse may be testimonial, the analysis does not stop there. The mere fact that a statement was made to a mandatory reporter does not itself make that statement testimonial, just as the mere fact that a statement was made to a police officer does not alone make that statement testimonial.

In defining "more precisely which police interrogations produce testimony," *Davis*, 547 U.S. at 822, the Court distinguished statements made during an "ongoing emergency" from those made after the immediate threat was over. Intertwined with this distinction, the Court also identified a divide between statements that relate "what is happening" from those that relate "what happened." *Id.* at 830. Justice Scalia, writing for the Court, opined that statements are testimonial when they serve as "a substitute for live testimony, because they do precisely what a witness does on direct examination." *Id.* To determine objectively the primary purpose of a conversation, and its resulting statements, a court should evaluate both the listener's and declarant's perspectives, as well as the totality of the surrounding circumstances.

Under each of these guidelines, a young child's statements, given while he was isolated from the rest

of the classroom, and in response to repeated questioning from public school teachers with a statutory mandate to report abuse, fall much closer to the formal end of the continuum outlined in *Crawford*; such statements are clearly not just "offhand, overheard remark[s]." *Crawford*, 541 U.S. at 51. When a child leaves school uninjured and returns the next day with visible marks of physical harm, as L.P did, there is no reason to suspect that another child in the classroom is at fault. After the teacher elicits information that supports suspicion of wrongdoing outside the school, even through observation and deduction alone, any questioning beyond that becomes investigative with a purpose likely leading to criminal charges. Here, there was no ongoing emergency, L.P.'s statements were about something that had happened, and in answering his teacher's interrogative questions, he did exactly what witnesses do. Accordingly, L.P.'s statements were testimonial.

A. Statements Do Not Require A Formal Interrogation To Be Testimonial

To determine a conversation's primary purpose, a court "objectively evaluate[s] the circumstances in which the encounter occurs and the statements and actions of the parties." *Michigan v. Bryant*, 131 S. Ct.1143, 1156 (2011). Statements "are testimonial when the circumstances objectively indicate that there is no ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S., at 822. Formality and interrogation are two parts of the testimonial test

that often are present together. Formality helps to distinguish an interrogation from a casual conversation. Yet, neither of these elements are necessarily a requirement for a declarant's statement to be "testimonial."

For example, assume a man happens to see a police officer and approaches her. Before she can say anything to him, he tells her that he observed a crime that morning. He states who committed the act, where it occurred, and at what time. This situation lacks both formality and interrogation yet there is little doubt that these statements are testimonial. These statements, though freely offered in a casual setting, make accusations and provide information that may be used to investigate a crime and prosecute the identified person.

Formality, while relevant to the totality of circumstances, cannot be an absolute requirement. Although many American cases applying the Confrontation Clause have "involved testimonial statements of the most formal sort which invites the argument that the scope of the Clause is limited to that very formal category," early English cases that gave rise to the American constitutional right "did not limit the exclusionary rule to prior court testimony and formal depositions." *Davis*, 547 U.S. at 826 (pointing to *Crawford*, 541 U.S. at 52, and n. 3). Furthermore, "although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to 'establish or prove past events potentially relevant to later criminal prosecution,' informality does not necessarily indicate the presence of an emergency or

the lack of testimonial intent." *Bryant*, 131 S.Ct. at 1160 (quoting *Davis*, 547 U.S. at 822).

The act of questioning itself cannot stand as an absolute requirement, either. Unsolicited accusations and reports of past events cannot be categorically barred from being testimonial. The focus should be on whether the declarant's statements established facts of a past crime and identified a perpetrator for the perceived purpose of investigation and prosecution – not whether the information was asked for or voluntarily given.

B. The Primary Purpose Test Should Include Both The Questioner's Intent and the Declarant's Understanding

This Court, in *Bryant*, clearly reaffirmed *Davis's* determination that both the questioner's and declarant's perspectives must be taken into account. Justice Sotomayor, writing for the Court and joined by Justices Roberts, Kennedy, Bryer, and Alito, asserted that proposition: "*Davis* requires a combined inquiry that accounts for both the declarant and the interrogator." 131 S.Ct. at 1160. A primary purpose test that alone relies on the questioner's intent or the declarant's perspective is inadequate. This is particularly so in situations where a questioner acts with more than one purpose, such as when she wants to help a victim declarant reach safety or heal from a trauma. The combined inquiry is even more necessary when the declarant is a young child with minimal understanding of the prosecutorial system. While the questioner's and the declarant's perspectives may diverge, one perspective

cannot uniformly trump the other. "An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose of the interrogation.'" *Bryant*, 131 S. Ct. at 1156.

Evaluating the listener's intent and purpose can be challenging. A questioner often acts with the dual purposes of trying to help *and* gathering evidence potentially usable in prosecution. Many public employees and mandated reporters often so act. The very nature of their positions makes it difficult to discern which, if either, purpose was primary. The questioner in such a position may give the purposes equal weight. Except for instances where it is abundantly clear that one purpose outweighs the other, there may be no clear answer to the question. It is not so clear whether reporting abuse is primarily protective or prosecutorial in nature when the two motives are entwined.

One of the surest ways to end abuse is to charge and convict an abuser; efforts to help and prosecute are inseparably intertwined. Where one purpose cannot be separated from the other, it becomes quite difficult to determine which purpose is "primary," from either perspective. Even prosecution itself can be characterized as primarily for the purpose of protecting and helping individuals and society as a whole. Teachers regularly act to protect their students while they are at school but their concerns may also extend to potential harm a student faces outside of school. Although these concerns may extend beyond the classroom, however, a teacher's

power to act often does not. Here is such an instance where the purpose to protect and to potentially prosecute are inseparable, for the only way a teacher can effectively protect a student from dangers outside of school is to report her knowledge and suspicions to law enforcement authorities in the hope that they will apprehend the abusive or neglectful person posing harm to the student. Without more information, it is difficult to determine whether the student declarant's statements should be considered testimonial.

A declarant is the single element that all Confrontation Clause issues share. Not even a listener is a constant, for testimonial statements may be made by written affidavit, without a specific individual recipient in mind. The declarant's intent, therefore, inarguably weighs heavily in the primary purpose analysis. Justices Scalia and Ginsburg singled out this perspective as the one that matters most in their dissents in *Bryant*, 131 S.Ct. at 1168-69, 1176. Yet, relying solely on the declarant's perspective is also problematic. If the declarant's understanding alone determines whether the statement is testimonial, young children's statements may well never be found to be testimonial, even though such a result would violate the purpose and spirit of the Confrontation Clause. When a child is incapable of understanding the prosecutorial consequences of an accusatory statement he makes, this raises questions of reliability – reliability being what most demands testing through cross-examination. Under a test that relies on the declarant's point of view alone, when a declarant cannot fully understand how his words

might be used for potential prosecution, those words will be labeled non-testimonial and not subject to this assessment of reliability. The result is the frustration of the *Crawford*-based Confrontation Clause test adopted by this Court when it rejected the *Roberts* reliability-based test: questionable statements go to a jury without allowing the accused the ability to test the witness's reliability by cross-examination. *See Ohio v. Roberts*, 448 U.S. 56 (1980), abrogated by *Crawford*, 541 U.S. 36.

Statements made by someone possibly incapable of understanding the future consequences of those statements are exactly those that an accused should be allowed to test through his right to confront witnesses against him. To say that a statement is not testimonial because the declarant did not understand that it could be used at trial, and therefore the accused is not guaranteed the right to challenge that statement, is illogical. Although the Court has moved away from the *Roberts* reliability test, reliability itself still plays a role in Confrontation Clause analysis. As the Court said in *Crawford*, 541 U.S. at 61:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point

> on which there could be little dissent), but about how reliability can best be determined.

A declarant's inability fully to comprehend the potential uses, and the consequences thereof, of his own statements immediately raises a red flag. If the declarant doesn't understand these things, who is to say that those statements were made honestly and sincerely? "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69.

To further avoid such a result, the primary purpose analysis should be from the objective viewpoint of a normally functioning, reasonable adult, rather than a reasonable child of the declarant's age. This would also apply in situations where the declarant is an adult with diminished faculties. Such a perspective would also protect against the threat of manipulating young children to make accusatory statements to state agents that are classified as non-testimonial. Bringing the child to a medical examiner or therapist could allow these state agents to collect non-testimonial statements even where the child clearly relates the facts of a crime and implicates an accused, because a young child in a doctor's office may believe that he is there for medical evaluation and nothing more. There is no reason a young child would know that his statements to a doctor, with no police present, would be used at a later trial, unless explicitly explained to him. Thus, a holding that statements to mandatory

reporters may be testimonial, but relying solely on the young child's perspective could produce such a result. The questioner's intent may be to gather information for trial but many children would not suspect this when speaking to a health professional. Accounting for both the questioner's intent and evaluating the declarant's statements from a reasonable adult's objective perspective reduces the possibility of such a manipulation.

Finally, requiring that the declarant understand the consequences of prosecution for his statements to be testimonial has no clear or workable boundary. Even an older child who understands that his statements will be used to punish someone and testifies in court cannot fully conceptualize what it means to sentence someone to years in confinement. How much of the prosecution process, and its consequences, must the declarant understand? Does the witness need to know every possible combination of prison terms, community service, and fines that an accused could be sentenced with for his statements before the court and jury to be testimonial?

C. The Totality of Circumstances Objectively Indicates That L.P.'s Statements To His Teacher Were Testimonial

At first glance, a conversation between a teacher and a student during schools hours looks nothing like a formal police interrogation. Unlike the recent cases before the Court, the questioners in this case are neither police officers nor 911 operators. In *Crawford*, *Davis*, *Hammon*, and *Bryant*, the presence

or absence of formal interrogation was easier to evaluate because the Court's jurisprudence has developed guidelines for assessing interactions with the police. What is informal in one situation, however, is not necessarily so in another. In this case, isolating L.P. and questioning him repeatedly was more formal than typical classroom conversation. Furthermore, the totality of circumstances objectively indicates that the teachers gathered information about a past event, there was no ongoing emergency, such as existed in *Davis* and *Bryant*, and, in answering his teachers' questions, L.P "[did] what witnesses do." *Davis*, 547 U.S. at 830.

While it is unclear where exactly on the spectrum of formality a conversation must fall to produce testimonial statements, the Court's emerging definitions of what is testimonial has included statements made outside of official interrogation settings. In *Davis*, the Court determined that "[i]t was formal enough that [the declarant]'s interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his 'investigat[ion].'" 547 U.S. at 829 (citing App. in No. 05–5705, at 34). Although L.P.'s teachers did not act to separate him from the accused, they did draw him away from the other children and take him to the office. Typically, children spend most of their time together, with a few supervisory figures out taking charge of the group. Isolating a child in a school office, where he is outnumbered by adults, and asking the same questions repeatedly is, for a young school child, the equivalent of police interrogation at the station for an adult. Even a three year old boy

would understand that something unusual was going on, and that it was serious enough to involve three authority figures (Whitley, Jones, Cooper).

A teacher's inquiries do not necessarily produce an interrogation leading to testimonial statements. Children fall in the play yard and quarrel with each other. It is unreasonable to expect a teacher to report every single injury to legal authorities without more information that may rule out these possibilities. When it is clear that an injury was sustained outside of school, obviously any information gathered may also be used in criminal prosecution against the source of those injuries. Whitely and her co-workers undoubtedly had the motive to make sure that L.P. was not harmed at school and to protect him from whatever harm he faced outside of school. The strong presence of a purpose to help, however, does not necessarily eliminate entirely the additional purpose to gather information for possible prosecution.

Ramona Whitley was confident that when L.P. left school on March 16, 2010, he did not have any injuries, but came to school with several marks on him the next day, March 17. 2010. Whitley adamantly affirmed that L.P. left school on March 16 uninjured no less than five times in her testimony. J.A. 31, 34, 36, 50. Whether the injuries came from an adult, another child, or an accident, they were severe enough to initiate investigation into L.P.'s home situation. Knowing that L.P.'s injuries were sustained sometime between leaving and returning to school was enough to trigger Whitley's duty to report suspected abuse. True, the statute does not

require reporters take on an investigation, but here the women did so. The report itself would serve Whitley's purpose to protect L.P. but there was no need for any of the teachers or school administrators to get a name from L.P

At a point where the questions are to obtain information about a past crime, and not to address an ongoing emergency, a police officer starts to collect testimonial statements; so too at this point does the teacher. Repeatedly asking a child "who did this to you?" after a child has said that he fell down, regardless of that answer's truth, amounts to leading the child to report a specific person as an abuser. The totality of the circumstances that produced L.P.'s statements, however, also shows the teachers' desire to learn what had happened and, ultimately, who had inflicted the injury. The teachers did this with the full intent to report to the proper authorities and with the understanding that the report could and would be used in a subsequent criminal investigation and trial.

A reasonable adult in L.P 's position would have known that his statements accusing "Dee" of inflicting his injuries could be used later in prosecution. From L.P.'s perspective, too, his statements were testimonial. Young children who are not informed about the intricacies of the American justice system are not entirely naïve. Children understand the concept of "getting in trouble" and subsequent consequences very early in their lives. While the declarant's purpose may not exactly align with the interrogator's purpose, interrogation seeking information for investigation

or prosecution is likely to alert the child to what is at stake. While L.P., at just three and a half years old, may not have understood that what he said could eventually be used in a criminal trial, he did understand that he was "telling on" someone and that there might be negative implications for that. Why else would such a young child repeatedly change his story about how he sustained his injuries? L.P. was reluctant to tell on "Dee." He said, multiple times, that he did not know what had happened or that he fell. Although L.P. had a number of injuries that he probably received over a number of incidents, it is unlikely that all three of these answers were correct. Whether he was instructed to lie, or did so of his own accord, this change in response and hesitance suggest that he understood the implications of reporting the responsible person to an authority figure.

Here, the teachers' preliminary questions in the lunchroom and classroom seem casual enough, and may not have crossed the line into interrogation. At the point at which L.P. provided "Dee's" name, however, he had been removed from his classroom, taken to the office, and had been questioned repeatedly by three different authority figures. While formal interrogation need not be an absolute requirement, it was present here, particularly from a young child's perspective.

Furthermore, although there may be dual purposes to a teacher's questioning, the argument that the repeated questioning here was *primarily* to ensure a child's continued safety fails. This totality of

circumstances objectively indicates that L.P.'s statements were testimonial.

II. ACKNOWLEDGING THAT A CHILD'S STATEMENTS ARE TESTIMONIAL WILL NOT NECESSARILY HANDICAP PROSECUTING CHILD ABUSERS

Direct statements from children are invaluable in abuse cases, particularly because child abuse usually happens behind closed doors and often is accompanied by threats, urging children not to tell anyone what has happened. It may be that a child's statements are the only evidence against the accused. A finding that those statements are testimonial requires that the child be available to the accused for cross-examination in order for those statements to be allowed into evidence. This requirement poses a challenge to the prosecution's case when the declarant is reluctant to testify, or if the court finds the declarant is incompetent to do so. Finding that a child's statements to his teacher are testimonial in nature will not prevent prosecutors from getting those crucial statements into evidence. While there is reluctance to make a young child testify, whether due to issues of trauma, competence, or any combination thereof, the justice system is not without recourse.

Rules that allow courts to better accommodate children opens the door for such recourse. This Court has stated that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or

her accusers in court." *Maryland v. Craig*, 497 U.S. 836, 853 (1990). In so stating, the Court made clear that a defendant's rights, while they may be outweighed, do still exist. *Id.* at 841-42. The solution, therefore, is to preserve Sixth Amendment rights while modifying the approach to children's testimony. The need to protect abuse victims should be accomplished by changing how courts are permitted to treat children, not by cutting off defendants' rights entirely in the name of promoting the public interest.

A. Utilizing Court Accommodations For Children Is Necessary And Feasible.

When a child is unavailable, for whatever reason, testimonial statements cannot be admitted into evidence, unless the accused had a prior opportunity to cross-examine. Skewing the concept of "testimonial" to gain admissibility into evidence of such statements is not an appropriate solution. The potential unavailability due to fear of re-traumatization can be addressed by alternative court room procedures tailored to children. These accommodating procedures are also valuable when a child's statements, while non-testimonial, do not meet a hearsay exception. The Court's holding that "so long as a trial court makes a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case" makes way for such accommodations. *Craig*, 497 U.S. at 860.

1. *Maryland v. Craig* is Still Good Law

Back when the Court still examined potential Confrontation Clause violations under the *Roberts* reliability test, *Ohio v. Roberts*, 448 U.S. 56 (1980), one particular case stressed the importance of protecting child abuse victims. *Craig*, 497 U.S. at 841–42, 857. The Court held that when testifying in a defendant's presence would traumatize a child witness, courts may employ alternative methods to take the child's testimony. *Id.* The Court determined that allowing a child in such circumstances to testify via closed-circuit television did not violate the Confrontation Clause and noted that while face-to-face confrontation at trial may be preferred, this preference "must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 849.

The *Crawford* decision that abrogated *Roberts* did not invalidate the *Craig* holding. *Crawford* and *Craig* determined two related, but very different issues. *Crawford* addressed whether an out-of-court statement is testimonial, and therefore subject to the confrontation right, while *Craig* dictated the manner in which in-court testimony may be taken to satisfy that right. *Crawford* examined, and set out new rules for evaluating, the nature of an out-of-court statement for Confrontation Clause purposes. *Craig*, however, provided guidance for the delivery of testimony during trial.

Although *Crawford* reshaped the category of out-of-court "testimonial" statements, it did not provide any indication that the methods of delivering live

testimony in court as approved in *Craig* should change. The *Crawford* Court focused on the Confrontation Clause's procedural guarantee that a statement's "reliability be assessed in a particular manner: by testing in the crucible of cross-examination." 541 U.S. at 61. In finding that a defendant's right to confrontation did not absolutely require a face-to-face meeting between the defendant and the witness at trial, *Craig* opened the door for live testimony, subject to direct and cross-examination, to be transmitted to the court through close circuit television. If an alternative method for providing testimony, such as CCTV, provides the accused the opportunity to cross-examine the testifying witness, the lack of direct, in-person contact should not violate the accused's right to confrontation.

Lower courts, both federal and state, have generally continued to utilize *Craig's* reasoning to facilitate alternative methods of obtaining child testimony in the years since *Crawford*. *See, e.g.*, *United States v. Kappell*, 418 F.3d 550, 554–55 (6th Cir. 2005) (finding that because *Crawford* only applies to testimonial hearsay from declarants who do not testify at trial, children's testimony taken outside of the court room did not violate the defendant's confrontation rights, particularly when the defendant acquiesced); *State v. Henriod*, 131 P.3d 232, 237-38 (Utah 2006) (noting "testimonial hearsay is significantly different from a child's testimony that is given under oath during trial and simply is transmitted into the courtroom by electronic means"). Those courts have rejected the notion that *Crawford* and *Craig* are incompatible. *See also Horn*

v. Quarterman, 508 F.3d 306, 318–19 (5th Cir. 2007); *United States v. Rosenau*, 870 F. Supp. 2d 1109, 114 (W.D. Wash. 2012); *State v. Stock*, 256 P.3d 899, 904 (Mont. 2011); *Blanton v. State*, 978 So.2d 149, 157–58 (Fla. 2008) (Bell, J., specially concurring); *State v. Arroyo*, 935 A.2d 975, 992 (Conn. 2007); *People v. Phillips*, 315 P.3d 136, 151 (Colo. Ct. App. 2012); *State v. Jackson*, 717 S.E.2d 35, 39 (N.C. Ct. App. 2011); *Roadcap v. Commonwealth*, 653 S.E.2d 620, 625 (Va. Ct. App. 2007); *State v. Blanchette*, 134 P.3d 19, 29–30 (Kan. Ct. App. 2006); *State v. Griffin*, 202 S.W.3d 670, 680–81 (Mo. Ct. App. 2006); *State v. Vogelsberg*, 724 N.W.2d 649, 654 (Wis. Ct. App. 2006).

The discretion that *Craig* affords courts in determining how to take and present testimony is broad and should be utilized accordingly.

2. State Legislation Can, And Does, Provide Solutions For Victim Witnesses

Although a child may have the capacity to understand the implications of testifying in a traditional setting, few courts would hesitate to declare an abused child unavailable as a witness; the risk of re-traumatization is indeed very real. However, through CCTV. and similar methods of presenting out-of-court testimony to a jury, such as pre-recorded video, a child may testify in a more relaxed environment, away from spectators and possibly even the accused. A child's ability to give testimony away from the accused is particularly advantageous when part of the child's inability to

testify in the traditional courtroom is premised on intimidation by the defendant. Where testimony is given and taken in a location away from the accused, the accused is prevented from exercising his confrontation right to the fullest, but the ability to exercise that right is not lost entirely. The accused's representative counsel must still be allowed to be present, and to cross-examine the child

All but two states, Maine, and North Dakota, allow by statute for testimony via closed-circuit televised (CCTV), video, or other electronic means. *See* Appendix A. Even where legislation does not expressly permit this type of testimony, case law indicates that the practice has been accepted. *See Hutchinson v. Cobb*, 90 A.3d 438 (Maine 2014) (allowing a child gave testimony in chambers when his father waived the rule that every witness must give testimony in open court).

Whether the accused has a right to be in the room with the child witness varies from state to state, but even the states that do not guarantee such presence maintain the accused's right to have counsel cross-examine the witness. *See* Appendix A. For example, Connecticut statutory provisions allow for the defendant to be in the room with the child during his testimony, "except that the court may order the defendant excluded from the room or screened from the sight and hearing of the child." Conn. Gen. Stat. Ann. § 54-86g(a) (West 2009). If the defendant is excluded from the room or screened from sight, "the court shall ensure that the defendant is able to observe an d hear the testimony of the child" and "the defendant shall be able to consult privately with

his attorney at all times during the taking of the testimony." *Id.*

Beyond CCTV, states can additionally accommodate children through even more creative solutions. Alaska's Code of Criminal Procedure, for example, provides in part that:

> The court ... may order that the testimony of the child be taken by closed circuit television or through one-way mirrors if the court determines that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate.

Alaska Stat. § 12.45.046(a)(2) (2012). Alaska permits courtroom modifications for children even when the court does not find that normal court procedures will result in the child's inability to effectively communicate. Alaska Stat. § 12.45.046(f) (2012). Upon considering the surrounding circumstances, the court may "supervise the spatial arrangements of the courtroom and the location, movement, and deportment of all persons in attendance." *Id.* Additionally, the court may:

> (1) allow the child to testify while sitting on the floor or on an appropriately sized chair;
> (2) schedule the procedure in a room that provides adequate privacy, freedom from distractions, informality, and

> comfort appropriate to the child's developmental age; and
> (3) order a recess when the energy, comfort, or attention span of the child warrants.

Id.

Some states leave the alternative approaches to child testimony more open-ended. Admirably in alignment with technological advances, Georgia grants courts broad leeway in delivering child testimony. The relevant statute, Ga. Code Ann., § 17-8-55(f) (Supp. 2014), states in part:

> The method used for allowing a child to testify outside the physical presence of the accused shall allow the judge, jury, and accused to observe the demeanor of the child as if he or she were testifying in the courtroom. When such testimony occurs it shall be transmitted to the courtroom by any device or combination of devices capable of projecting a live visual and oral transmission, including, but not limited to, a two-way closed circuit television broadcast, an Internet broadcast, or other simultaneous electronic means.

State legislative bodies can, and do, amend these statutory provisions; Georgia's innovative statute went into effect just last July, 2014.

Providing a child's testimony through special accommodations does have the potential to be

prejudicial to the defendant. But where the alternatives are the prosecution losing the ability to present valuable statements, or the accused losing his constitutional rights, this model serves to address the concerns of both parties.

B. States Must Amend Competency Rules To Allow Young Children to Testify In Criminal Cases

While the majority of states provide for alternative methods of obtaining child testimony, the witness competency rules in half of the states allow trial judges to find that very young children are incompetent to testify as witnesses. *See* Appendix B. Under such rules, a witness's lesser cognitive capacity stands in the way of using statements essential to the prosecution of crimes against children. A child's credibility, like any other witness's, should be an issue for the triers of fact to decide, not one that prevents testimony entirely. The Advisory Committee notes for Fed. R. Evid. 601 provide:

> No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. Weihofen, Testimonial Competence and Credibility, 34 Geo.Wash.L.Rev. 53 (1965). Discretion is regularly exercised in favor of allowing the testimony. A witness

> wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence. 2 Wigmore §§ 501, 509.

Allowing young children to testify in criminal cases, even when they have a limited cognitive capacity, enables the prosecution to use valuable statements and guarantees the accused will get to confront the witnesses against him.

1. Systems Like Ohio's Evidence System Are Flawed

Although hearsay exceptions for unavailable declarants may still facilitate the admissibility of a child's non-testimonial statements, such evidentiary rules are entirely ineffective for testimonial statements in criminal prosecutions when they contradict the Confrontation Clause. The United States Constitution's Supremacy Clause, U.S. Const. Art. VI, cl. 2, demands this hierarchy of authority:

> This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any Thing in the constitution

> or laws of any state to the contrary notwithstanding.

The *Crawford* opinion, 541 U.S. at 61, reaffirms that rules of evidence cannot be used to escape the mandate of the Confrontation Clause:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." ... Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, *but it is a procedural rather than a substantive guarantee.* It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Ohio's evidence rules have, in this case, produced such a disastrous result in terms of violation of the accused's confrontation rights. In Ohio, "[e]very person is competent to be a witness except [t]hose of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." Ohio R. Evid. 601. Because L.P. was unable to provide consistent and accurate answers to questions

about matters such as the adult he lived with, the trial court declared that he was incompetent to testify under the provisions of this rule. J.A. 5-12. Consequently, the state lost its ability to use L.P.'s testimonial statements to prosecute Clark.

Even if L.P.'s out-of-court statements were not testimonial, Ohio's competency requirement would prevent the prosecution from admitting them into evidence through a hearsay exception. Traditional hearsay exceptions and exemptions are largely based on the rationale that qualifying statements are made under circumstances that ensure reliability and trustworthiness. When a trial court finds that a child is not competent to be a witness, it defies logic to conclude that the child's contested hearsay statements are reliable enough to be within a traditional hearsay exception. Ohio has enacted a special hearsay exception for children's statements in abuse cases, as has a number of other jurisdictions. Ohio's exception requires that "circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement." Ohio R. Evid. 807. A child cognitively incapable of consistently telling the truth for trial most likely would not have been capable of doing so months, or even years, before when he made the contested statements.

Therefore, when a court declares a child incompetent to testify, that declaration creates a likely possibility that the child's statements cannot be admitted *at all*. The "incompetent to testify" label itself destroys the reliability of the child's earlier

statements for hearsay purposes. The child's unavailability prevents the accused from the cross-examination required under the Confrontation Clause and therefore also bars the statement from evidence. A better solution is to allow the child to testify and to leave any credibility issues to the jury.

2. Competency Rules That Allow For Child Testimony Will Aid Prosecution

Restrictive competency rules prevent young children from testifying in court, severely hindering the prosecution's ability to enter statements into evidence. If a court does not permit a child to testify, the prosecution is unable to use any of the child's out-of-court testimonial statements no matter how valuable they are. However, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, 541 U.S. at 59 n.9 (citing *California v. Green*, 399 U.S. 149, 162 (1970)).

While a young child may be too shy to testify, have memory difficulties, or give inconsistent statements, these factors should not prevent the child from appearing for cross-examination. The requirements to be available for cross-examination are rather limited. In *United States v. Owens*, 484 U.S. 5541, 561-61 (1988) the Court stated:

> Ordinarily a witness is regarded as "subject to cross-examination" when he is placed on the stand, under oath, and

> responds willingly to questions. Just as with the constitutional prohibition [of the Confrontation Clause], limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the Rule no longer exists. But that effect is not produced by the witness' assertion of memory loss

The victim witness in *Owens* remembered earlier identifying the accused during an interview with an F.B.I. agent but, due to injuries he suffered from the assault, he was unable to remember the incident of the assault itself. The Court concluded that the witness's memory loss did not render him unavailable for cross-examination. *Id.* at 560-61. The Court recalled its decision in *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985), quoting:

> The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.

Taken together, the rules from *Crawford*, *Owens*, and *Fensterer* allow for a child to be available for cross-examination, even though he may be a poor witness on the stand. Accordingly, allowing a child to testify, even with flawed capacity, would allow the prosecution to admit any of the child's prior out-of-court statements without raising a Confrontation Clause issue.

Lower courts have commonly ruled that although a child witness may be evasive this does not alter the convention that a witness who willingly responds to questions is constitutionally available for cross-examination to satisfy the confrontation requirement. *See* Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 594-96 (2005) (reviewing how courts have handled young children as witnesses available for cross-examination). An example discussed by Professor Mosteller is a case in which the United States Court of Appeals for the Sixth Circuit approved of a trial court's decision that allowed a young girl, who was four at the time she reported sexual abuse to her mother, to be available for cross-examination. The Sixth Circuit found that her appearance at trial, about one year later, satisfied the confrontation requirement. *Bugh v. Mitchell*, 329 F.3d 496, 510-11 (6th Cir. 2003). The girl only testified verbally about one act of abuse; she gave the remainder of her responses by nodding negatively or affirmatively or by shrugging. *Id.* at 502-04. The court, relying on the *Owens* and *Fensterer* opinions, explained that "[w]hile counsel's cross-examination of [the girl] may

not have yielded the desired answers, and [she] may not have recalled the circumstances surrounding her previous statements, counsel clearly had the opportunity to expose such infirmities, by pointing out [her] youth and lack of memory." *Id.* at 508. Furthermore, the court added, "the jury had the opportunity to observe [the girl's] demeanor, thus permitting the jury to draw its own conclusions regarding her credibility as a witness." *Id.*

Young children may be incapable of comporting themselves the same way adults do in court. Still, this should not bar them from being available for cross-examination. Testimonial deficiencies, such as non-verbal responses, should be factors for the jury to evaluate, not absolute bars to testifying. Witness competency rules do not need to be construed to allow for just any level of cognitive capacity, but these rules should at least permit child victims to testify in criminal cases. This allowance, complying with an accused's constitutional right to confront witnesses against him, will permit the prosecution to use these victim's statements to the fullest extent.

3. The Solution: Evidence Rules That Do Allow For Children To Be Available To Testify

Determinations of a child's competency to testify is not an issue in all jurisdictions. Federal Rule of Evidence 601, as noted, declares all persons to be competent. Half of the states have adopted the Federal Rules of Evidence without altering the substance of Rule 601. *See* Appendix B.

A few states go a step further to ensure admissibility of a child victim's statements and instead expressly declare that when a child is a victim or a witness of the crime being prosecuted, that child is absolutely competent to testify in the trial for that prosecution. *See* Appendix B. In Alabama, for example, state legislation provides that:

> Notwithstanding any other provision of law or rule of evidence, a child victim of a physical offense, sexual offense, or sexual exploitation, *shall be considered a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding.* The trier of fact shall be permitted to determine the weight and credibility to be given to the testimony. The court may also allow leading questions of the child witnesses in the interest of justice.

Ala. Code 1975 § 15-25-3(e) (Lexis 2011) (emphasis added).

Delaware expressly provides that a child's inability to understand the oath does not make him incompetent to testify and that a "child's age and degree of understanding of the obligation of an oath may be considered by the trier of fact in judging the child's credibility." Del. Code Ann. tit. 10, § 4302 (2014). Particularly where a child's statements are the crux of the evidence against an allegedly abusive defendant, the prosecution should seek to reinforce the statements' reliability through some form of the

child's testimony. Rather than sacrifice these valuable statements to equitably protect an accused's Sixth Amendment rights, state legislation should broaden competency rules to allow more child testimony, through whichever channels best serve the child's emotional and psychological needs, so that both the defendant and prosecution's procedural needs are met. Courts will proactively protect child victims, if enabled to do so.

Even if L.P.'s statements were not testimonial, they must have still satisfied some hearsay exception to be admitted into evidence. These hearsay exceptions are permitted on the premise that certain circumstances create a guarantee of trustworthiness for out-of-court statements. The determination that L.P. was incompetent to testify at trial, because he could not provide the same answers to the same questions in a competency hearing, is inconsistent with the notion that L.P.'s statements qualified for a hearsay exception and prevented the prosecution from using these statements.

CONCLUSION

The Court should affirm the Ohio Supreme Court's ruling and find children's statements to statutorily mandated reporters to be testimonial when the totality of circumstances indicates objectively that the statements would likely be relevant in a criminal investigation and prosecution. Such an affirmation will not restrain efforts to prosecute child abusers. A child's statements that are crucial to a prosecution can be admitted into evidence if state court rules accommodate child witnesses. Abuse

prosecutions must not proceed if the only way to make the case is by violating an accused's constitutional rights.

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APPENDIX A

TAXONOMY OF STATE ALTERNATIVE TESTIMONIAL METHODS

The following information details the different ways in which the states allow for children to provide testimony in abuse cases. No state is without statutes or case law that allows for the courts to enable a child to provide testimony away from the full courtroom, or from the face-to-face presence of a defendant. The laws allowing courts to facilitate child testimony range from those that specifically allow for CCTV only, to those that broadly allow for any alternative method the trial court sees fit. As technology develops, and becomes easier and less costly for courts to use, state legislative bodies should amend existing laws to allow for the courts to employ these newer methods.

A. Statutes That Allow For CCTV Testimony

ALABAMA: Ala. Code 1975 § 15-25-3 (LexisNexis 2011).
ALASKA: Alaska Stat. § 12.45.046 (2012).
ARIZONA: Ariz. Rev. Stat. § 13-4253 (2010).
Arizona also allows for video recorded testimony. See below.
ARKANSAS: Ark. Code Ann. § 16-43-1001 (1999).
CALIFORNIA: Cal. Penal Code § 1347 (West Supp. 2014).
COLORADO: Colo. Rev. Stat. § 16-10-402 (2014).

CONNECTICUT: Conn. Gen. Stat. Ann. § 54-86g (West 2009).
DELAWARE: Del. Code Ann. tit. 11, § 3514 (2007).
FLORIDA: Fla. Stat. Ann. § 92.54 (West Supp. 2015). Fla. Stat. Ann. § 92.55 (West Supp. 2015).
GEORGIA: Ga. Code Ann. § 17-8-55 (Supp. 2014).
HAWAII: Haw. Rev. Stat. § 616-1 (1993).
ILLINOIS: 725 Ill. Comp. Stat. Ann. 5/106B-5 (West Supp. 2014).
IOWA: Iowa Code Ann. § 915.38 (West Supp. 2014).
KANSAS: Kan. Stat. Ann. § 22-3434 (2007).
KENTUCKY: Ky. Rev. Stat. Ann. § 421.350 (West 2005).
LOUISIANA: La. Rev. Stat. § 15:283 (Supp. 2014).
MARYLAND: Md. Code Ann. Crim. Proc. § 11-303 (LexisNexis 2008).
MINNESOTA: Minn. Stat. Ann. § 595.02 (2010).
MISSISSIPPI: Miss. Code Ann. § 13-1-405 (2012); Miss. R. Evid. 617.
NEW JERSEY: N.J. Stat. Ann. § 2A:61B-1 (West 2014). N.J. Stat. Ann. § 2A:84A-32.4 (West Supp. 2014).
NEW YORK: N.Y. Crim. Proc. Law §§ 65.00 30 (McKinney 2004).
OHIO: Ohio Rev. Code Ann. § 2152.81 (West 2005); Ohio Rev. Code Ann. § 2945.481 (West 2006); Ohio Rev. Code Ann. § 2937.11 (West 2006).
OKLAHOMA: Okla. Stat. Ann. tit. 10, § 1-4-506 (West 2009); Okla. Stat. Ann. tit. 12, §§ 2611.3 2611.10 (West 2009).
OREGON: Or. Rev. Stat. § 419C.025 (2013). Oregon also allow for telephone appearances.
RHODE ISLAND: R.I. Gen. Laws § 11-37-13.2 (Supp. 2014).

SOUTH DAKOTA: S.D. Codified Laws § 26-8A-30 (Supp. 2014).
TENNESSEE: Tenn. Code Ann. § 24-7-120 (Supp. 2014). Tennessee has another statute, below, which addresses pre-recorded video separately.
TEXAS: Tex. Crim. Proc. Code Ann. art. 38.071 (West Supp. 2014).

B. Statutes That Allow For Pre-Recorded Testimony

These states allow for pre-recorded testimony to be used in trial, when the defendant has had an opportunity to cross-examine the witness during the making of the recording or the witness also appears to testify in court.

INDIANA: Ind. Code Ann. § 35-37-4-6 (2012).
MISSOURI: Mo. Ann. Stat. § 491.680 (2011).
NEBRASKA: Neb. Rev. Stat. Ann. § 29-1926 (2008).
NORTH DAKOTA: N.D. Cent. Code § 31-04-04.1 (2010). Pre-recorded video is permitted for sexual assault cases only.
SOUTH CAROLINA: S.C. Code Ann. § 16-3-1550 (Supp. 2014); S.C. Code Ann. § 19-1-180 (2014).
TENNESSEE: Tenn. Code Ann. § 24-7-117 (2000). Pre-recorded video is permitted for sexual assault cases only.
UTAH: Utah R. Crim. Proc. 15.5 (2014).
VERMONT: Vt. R. Evid. 807 (2003).
VIRGINIA: Va. Code Ann. § 18.2-67.9 (2014); Va. Code Ann. § 63.2-1521 (2012).
WASHINGTON: Wash. Rev. Code Ann. § 9A.44.150 (West).

WEST VIRGINIA: W. Va. Code Ann. §§ 62-6B-2 to -4 (LexisNexis 2014); W. Va. Child Abuse And Neglect Proceedings, R. 9 (LexisNexis 2014).
WISCONSIN: Wis. Stat. Ann. § 972.11 (West Supp. 2014).

ARIZONA: Ariz. Rev. Stat. § 13-4252 (2010). Arizona does not require that the defendant have had an opportunity to cross-examine the child, but if the video is used in trial, either party may call the witness to testify and be cross-examined.

C. Statutes That Allow For Alternative Methods Of Testimony

Idaho, Nevada, and New Mexico broadly allow for "alternative" means of testimony, meaning any form of testimony by which the child does not testify in an open forum, in the presence and full view of the finder of fact, or allowing for all of the parties to be present to participate and view or be viewed by the child.

IDAHO: Idaho Code Ann. §§ 9-1801-1808 (2010).
NEVADA: Nev. Rev. Stat. Ann. §§ 50.500-540; 50.570-610 (LexisNexis 2012).
NEW MEXICO: N.M. Stat. Ann. § 38-6A-1 to -9 (LexisNexis 2014).
MASSACHUSETTS: Mass. Gen. Laws Ann. ch. 278, § 16D (West 2014). Massachusetts allows for testimony via CCTV, recorded video, and simultaneous electronic means.
MICHIGAN: Mich. Ct. R. § 3.923; Mich. Comp. Laws Ann. § 712A.17b (West 2012). Michigan allows for CCTV and speaker telephone and "other

similar electronic equipment."

MONTANA: Mont. Code Ann. § 46-16-229 (2013). Montana allows for testimony via "two-way electronic audio video communication."

NORTH CAROLINA: N.C. Gen. Stat. § 15A-1225.1 (2013). North Carolina allows for any form of remote testimony, as long as the court can observe the demeanor of the child and the defense counsel is present.

PENNSYLVANIA: 42 Pa. Cons. Stat. Ann. §§ 5982, 5984.1, 5985 (West 2014). Pennsylvania allows for CCTV and other "contemporaneous" methods, such as streaming via the Internet.

WYOMING: Wyo. R. Cr. Proc. 26 (2014). Wyoming allows for testimony by "electronic means."

D. Case Law That Allows For Alternative Testimony

MAINE: In *Hutchinson v. Cobb*, 90 A.3d 438 (Me. 2014), the court allowed a child to give testimony in chambers when the father waived M. R. Civ. Proc. 43(a), which requires every witness to give testimony in open court.

NEW HAMPSHIRE: *State v. Hernandez*, 986 A.2d 480 (N.H. 2009) upheld the use of CCTV where the circumstances meet the factors articulated in *Craig*.

E. How States Handle Face-to-Face Confrontation

The following information comes from the same statutes as those listed above for each state.

These states only allow for the defendant's attorney to be in the room during the child's testimony.

ALABAMA, ALASKA, ARIZONA, ARKANSAS
CALIFORNIA, COLORADO, DELAWARE,
GEORGIA, HAWAII, ILLINOIS, IOWA, KANSAS,
KENTUCKY, LOUISIANA, MARYLAND,
MONTANA, NORTH DAKOTA, OHIO,
OKLAHOMA, PENNSYLVANIA, RHODE ISLAND,
SOUTH DAKOTA, TEXAS, VIRGINIA,
WASHINGTON, WEST VIRGINIA, WISCONSIN.

These states allow for the defendant to be present in the room when the child provides alternative testimony, unless the court determines that it would traumatize the child.

CONNECTICUT, FLORIDA, IDAHO,
MASSACHUSETTS, MINNESOTA
MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA,
NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO,
NEW YORK, SOUTH DAKOTA, UTAH.

These states are silent on whether the defendant may be in the room with the child during alternative testimony.

INDIANA, MICHIGAN, NORTH CAROLINA,
OREGON, SOUTH CAROLINA, WYOMING.

TENNESSEE allows the defendant to be present, in person, for a child's recorded testimony, but requires that the defendant remain in the courtroom during CCTV testimony.

APPENDIX B

TAXONOMY OF WITNESS COMPETENCY RULES

While almost half of the states have open-ended competency rules that allow for even a young child to testify in court, the remaining states have competency rules in place that may disqualify a young child from testifying in court. Only three of these states allow for a child victim to testify in a criminal trial, without a competency determination. While competency threshold requirements may serve well for civil cases, they also greatly hinder the prosecution's ability to use a young child's statements in a criminal trial. To facilitate child testimony, states with competency restrictions should also create special provisions that allow for a child victim to testify in a criminal trial. As with adult testimony, the issue of credibility should be for the trier of fact to determine.

A. States With Rules Similar To Fed. R. Evid. 601

These twenty-four states have competency rules that are substantively the same as the federal rule. These states do not have additional rules that disqualify witnesses based on age or mental capacity.

ALABAMA: Ala. R. Evid. 601.
ARIZONA: Ariz. R. Evid. 601.
ARKANSAS: Ark. R. Evid. 601.

CONNECTICUT: Conn. Code Evid. § 6-1.
DELAWARE: Del. R. Evid. 601.
GEORGIA: Ga. Code Ann. § 24-6-601 (2013).
INDIANA: Ind. R. Evid. 601;
Ind. Code § 34-45-2-1 (LexisNexis 2008).
IOWA: Iowa R. Evid. 5. 601.
LOUISIANA: La. Code Evid. Ann. art. 601 (2006)
MARYLAND: Md. R. Evid. § 5-601.
MISSISSIPPI: Miss. R. Evid. 601.
NEBRASKA: Neb. Rev. Stat. § 27-601 (2008).
NEVADA: Nev. Rev. Stat. Ann. § 50.015
(LexisNexis 2008).
NEW MEXICO: N.M. R. Evid. 11-601 (2010).
NORTH DAKOTA: N.D. R. Evid. 601 (2011).
OKLAHOMA: Okla. Stat. tit. 12, § 2601 (2009).
OREGON: Or. Evid. Code 601
RHODE ISLAND: R.I. R. Evid. 601.
SOUTH DAKOTA: S.D. Codified Laws § 19-14-1
(R. 601) (2004).
TENNESSEE: Tenn. R. Evid. 601.
UTAH: Utah R. Evid. 601.
WEST VIRGINIA: W. Va. R. Evid. 601.
WISCONSIN: Wis. Stat. § 906.01
WYOMING: Wyo. R. Evid. 601.

B. Rules That Make Competency Conditional

These twenty-six states have rules that require a certain level of mental capacity for a witness to be competent, although three of them make exceptions for children in criminal trials: COLORADO, MISSOURI, and PENNSYLVANIA.

Every one of these states requires that the

witness understand the need to tell the truth or be able to relate facts truly. Five states require that the witness be generally able to remember the facts he or she will testify about: Kentucky, Massachusetts, Minnesota, New Hampshire, and Pennsylvania. Five states require that the witness be capable of receiving the just impressions of the facts: COLORADO, IDAHO, MISSOURI, OHIO, and WASHINGTON. These thresholds are cumulative; a witness must meet every requirement to be found competent. These requirements likely prove difficult for young children to meet.

ALASKA: Alaska R. of Evid. 601.
CALIFORNIA: Cal. Evid. Code §§ 700, 701.
COLORADO: Colo. Rev. Stat. § 13-90-106 (2014).
FLORIDA: West's F.S.A. § 90.603 (2011).
HAWAII: Haw. Rev. Stat. §626-1 R. 603.1 (1993).
IDAHO: Idaho Code Ann. § 9-202 (2010).
ILLINOIS: 725 Ill. Comp. Stat. 5/115-14 (2010).
KANSAS: Kan. Stat. Ann. §§ 60-407, 60-417 (2005).
KENTUCKY: Ky. R. Evid. 601.
MAINE: Me. R. Evid. 601.
MASSACHUSETTS: Ma. R. Evid. §601.
MICHIGAN: Mich. R. Evid. 601.
MINNESOTA: Minn. Stat. § 595.02 Sub. 1(f) (West Supp. 2015).
MISSOURI: Mo. Rev. Stat. § 491.060 (2011).
MONTANA: Mont. Code Ann. ch. 10, R. 601 (2013).
NEW HAMPSHIRE: N.H. R. Evid. 601.
NEW JERSEY: N.J. R. Evid. 601.
NEW YORK: N.Y. Crim. Proc. Law § 60.20 (2010).
NORTH CAROLINA:
N.C. Gen. Stat. § 8C-1, R. 601 (2013).

OHIO: Ohio R. Evid. 601; Ohio Rev. Code Ann. § 2317.01 (2004).
PENNSYLVANIA: Pa. R. Evid. 601.
SOUTH CAROLINA: S.C. R. Evid. 601.
TEXAS: Texas R. Evid. 601.
VERMONT: Vt. R. Evid. 601.
VIRGINIA: Va. Sup.Ct. R. 2:601
WASHINGTON: Wash. Rev. Code § 5.60.050 (2009).

C. Rules With Special Provisions For Child Victims

These states have statues that allow children victims to testify always, regardless of age or capacity.

ALABAMA: Ala. Code 1975 § 15-25-3(e) (2011)
ARIZONA: Ariz. Rev. Stat. § 13-4061
COLORADO: C.R.S.A. § 13-90-106
GEORGIA: Ga. Code Ann. § 24-8-20 (2013).
MISSOURI: Mo. Rev. Stat. § 491.060 (2011).
PENNSYLVANIA: 42 Pa. Cons. Stat. § 5911 (2008).
UTAH: Utah Code Ann. § 76-5-410 (2010)
WEST VIRGINIA: W. Va. Child Abuse And Neglect Proc., Rule 8 (2009).

AMICUS CURIAE BRIEF

No. 13-1352

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

AMICUS CURIAE BRIEF OF CHILD JUSTICE, INC. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*.[1]

Child Justice is a national organization that advocates for the safety, dignity, and self-hood of abused, neglected, and at-risk children. The mission of Child Justice is to protect and to serve children in cases where child sexual abuse, physical abuse, or domestic violence is present. It works with local, state, and national advocates, legal and mental health professionals, and child welfare experts to defend the interests of affected children. It provides public policy recommendations, community service referrals, court watching services, research, and education. Child Justice also serves important public interests by securing pro bono representation for protective parents in financial distress and by seeking appropriate judicial solutions to the threats facing abused, neglected, and at-risk children.

Child Justice is concerned about the negative effect that the Ohio Supreme Court's ruling will have on the safety and welfare of the abused and threatened children on whose behalf Child Justice advocates every day. The Ohio Supreme Court's

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amicus curiae* represents that it authored the brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than the *amicus curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice under Rule 37.2(a) of intent to file this brief was provided to the Petitioner and the Respondent. Both have provided to the Court blanket consent to the filing of *amicus curiae* briefs in this matter.

ruling compounds the practical and legal challenges of proving child abuse beyond a reasonable doubt without the admission at trial of a child's statement to a required reporter. Child Justice has a strong interest in this Court upholding the intent of the Ohio Legislature that information learned through the required reporting process be available to prosecutors at trial to further the goal of providing complete protection to children by punishing those who abuse and endanger them.

SUMMARY OF ARGUMENT

Ohio has a compelling state interest in protecting children from abuse. It is part of Ohio's fundamental responsibility to ensure the safety and welfare of children who cannot protect themselves. OHIO REV. CODE § 2151.421 ("Ohio's Required Reporter Statute") was enacted as part of Ohio's child welfare legislative scheme and is a cornerstone on which Ohio's policy of protecting children depends. There can be no doubt that criminal prosecution, while not the primary purpose of Ohio's Required Reporter Statute, is a necessary and contemplated adjunct to further Ohio's policy to protect children. The enactment and later amendments to Ohio's Required Reporter Statute reflect a consistent intent on the part of Ohio's Legislature to expand the scope of professionals qualifying as required reporters, the information that is reported, and the use of that information in both civil and criminal proceedings. Many other states with required reporter statutes similar to

Ohio have also made clear that punishing offenders is part of the legislative goal of protecting children.

If affirmed, the Ohio Supreme Court's ruling will impede that goal because of the many cases that will not be prosecuted or will not result in a conviction without the admission at trial of a child victim's statements to a required reporter. These cases are all too common, and involve the most vulnerable children with the least access to the justice system. Allowing admission at trial of a child's statement to a required reporter is consistent with the legislative intent of Ohio's Required Reporter Statute, and similar statutes in other states, and serves to ensure that no offender slips through the cracks.

ARGUMENT

I. THE LEGISLATIVE INTENT OF OHIO'S REQUIRED REPORTER STATUTE AND SIMILAR STATUTES IN OTHER STATES IS TO PROTECT CHILDREN, INCLUDING THROUGH CRIMINAL PROSECUTION OF CHILD ABUSERS.

The primary purpose of any required reporter statute is to protect victims and potential victims of child abuse who cannot protect themselves because of their age, the circumstances of the abuse, or legal obstacles that limit their access to, and participation in, the justice system. *See* Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*. 11 GEO.

J. LEGAL ETHICS 509, 525 n.82 (1999) (explaining that the purpose of required reporter statutes is "to protect a child who is unable to protect himself"). These laws, typically enacted as part of larger child welfare regimes, enable States to carry out their fundamental responsibility to protect the best interests of children by mandating that certain professionals in the best position to identify child abuse report their reasonable suspicions, and by providing those professionals with a formal reporting structure to ensure the safety and welfare of the children in their care. The mandatory reporting duty serves a vital function within the larger child welfare system because children so often are unable physically and emotionally to notify authorities on their own and to articulate affirmatively and coherently the abuse that has been inflicted upon them. As one scholar has noted:

> Oftentimes, there is no physical evidence of the abuse. Children will frequently recant their allegations, since the vast majority of these crimes are committed by a parent, other relative, or by a friend of the family. The child is often the only witness to the crime because these crimes take place in secret. Furthermore, the young child witness may be incapable of understanding the nature of the crime, the significance of his or her testimony, or be too frightened or anxious to

> testify. The problem is compounded when courts find young children incompetent to testify on the grounds that they are unable to distinguish the truth from lies or because they are unable to communicate in a traditional courtroom setting.

Deborah Paruch, *Silencing the Victims in Child Sexual Abuse Prosecutions: the Confrontation Clause and Children's Hearsay Statements Before and After Michigan v. Bryant*, 28 TOURO L. REV. 85, 85-86 (2012). Simply put, "[i]f the child easily could report the abuse, there would be no reason for the reporting statutes." Marrus, 11 GEO. J. LEGAL ETHICS at 525 n.82.

The fundamental legislative purpose behind Ohio's Required Reporter Statute, and similar statutes throughout the country, is to give children a vehicle to voice their abuse and to trigger the process by which social services and law enforcement remove the imminent threat of additional harm, and where appropriate, prosecute the alleged perpetrators of the abuse. To that end, many states have made clear that the goal of protecting children through required reporting statutes includes punishing offenders. Therefore, Ohio and other states allow for the use of statements by children made to required reporters and communicated to social services and/or law enforcement authorities in criminal prosecutions.

As the dissent below so rightly grasped, prosecution of child abusers, while not the overarching goal of the statute, is "a necessary and appropriate adjunct in providing such protection.'" *State v. Clark*, 137 Ohio St. 3d, 2013-Ohio-4731, 999 N.E.2d 592, ¶ 78 (O'Connor, C.J., dissenting) (quoting *Yates v. Mansfield Bd. of Educ.*, Ohio 102 St. 3d 205, 2004-Ohio-2491, 808 N.E.2d 861, ¶ 25). Affirming the Ohio Supreme Court's ruling would severely undermine the ability of Ohio, and many other states, to enforce the policy of protecting victims and potential victims of child abuse, which cannot be accomplished without the ability to see the process through to prosecution and conviction.

A. Ohio's Required Reporter Statute and Its Amendments Reflect a Consistent Legislative Intent to Make Information Learned by Required Reporters Available in Criminal Proceedings.

First adopted in 1963, Ohio's Required Reporter Statute is part of Ohio's Juvenile Code, which, as one of its purposes, aims "[t]o provide for the care, protection, and mental and physical development of children whenever possible, in a family environment ." OHIO REV. CODE ANN. § 2151.421(A). The required reporter section of the Juvenile Code was originally limited to establishing an affirmative duty by physicians, including hospital interns and resident physicians, to promptly report any evidence gathered from an examination of a child less than 18 of "injury or physical neglect not

explained by the available medical history." OHIO REV. CODE ANN. § 2151.421 (LexisNexis 1963). The statute further required the physician to submit such reports to a municipal or county police officer in both oral and written form. *Id.* The type of information to be submitted was broadly inclusive; it encompassed all "information that the physician believes might be helpful in establishing the cause of the injury or physical neglect." OHIO REV. CODE ANN. § 2151.421(C) (1963).

From the very inception of Ohio's Required Reporter Statute, the Ohio Legislature made clear that it did not want to hinder the collection or use of evidentiary support for a related prosecution of a child abuser. The first version of the statute contemplated the use of such evidence in *both* civil and criminal proceedings, and more to the point, expressly exempted any evidence obtained from a physician from the physician-patient privilege: "[T]he physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries or physical neglect, or the cause thereof in *any* judicial proceeding resulting from a report submitted to this section." *Id.* (emphasis added).

Since its adoption in 1963, and in recognition of the many avenues through which professionals interact with children on a daily basis, Ohio's Required Reporter Statute has been continuously expanded to encompass new categories of reporters. The first amendments to the statute, passed in 1965, included nurses, schoolteachers, and social workers

as required reporters, and mandated that they report to municipal or county peace officers when they had "reason to believe that a child less than eighteen years of age has suffered any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of such child." OHIO REV. CODE ANN. § 2151.421 (1965). In 1985, the statute was again broadened to include all school employees. OHIO REV. CODE ANN. § 2151.421 (1985).

The current version of the statute sets forth 35 categories of professionals and other workers who qualify as required reporters, and requires that they not only report reasonable suspicion of past abuses, but also the threat of future abuse to children under 18. *See* OHIO REV. CODE ANN. § 2151.421(A)(1)(a) (LexisNexis 2014) (describing duty to report reasonable suspicion that a child "has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child"). This expanded class of required reporters encompasses a broad range of professionals, including attorneys, physicians and medical professionals, psychologists and therapists, coroners, day care providers, camp counselors, teachers, social workers, and educational administrators. OHIO REV. CODE ANN. § 2151.421(A)(1)(b) (LexisNexis 2014).

In effect, by including within its ambit virtually every person who comes into contact with a child in a professional capacity, Ohio's Required Reporter Statute today exemplifies the Ohio

Legislature's intent to provide every opportunity for victims or potential victims of child abuse to have a voice in any situation in which they are placed outside the home. *See also Clark*, 137 Ohio St. 3d 346, 2013-Ohio-4731, 999 N.E.2d 592, at ¶ 76 (O'Connor, C.J., dissenting) ("Child abuse is not confined to the home. Tragically, children are also sometimes abused and neglected by the institutions meant to care for them."). The goal is a comprehensive detection system so that no child "falls through the cracks."

In addition to the expanded class of reporters, the statute ensures that as much information regarding the abuse is made available to the proper authorities, both civil and criminal. Under the current version of the statute, required reporters maintain a duty to report to the public children services agency or municipal or county peace officer in the county in which the child resides or in which the abuse has taken place. OHIO REV. CODE ANN. § 2151.421(A). The nature of the report and the breadth of the information it must contain, remains largely unchanged since 1963, and reflects the consistent policy throughout the history of amendments to Ohio's Required Reporter Statute that information learned by required reporters pursuant to the mandatory reporting duty be available in criminal prosecutions. The reporter must make both an oral and written report "forthwith," the latter to include (1) information identifying the child and his/her parent; (2) the

extent of the child's injuries; and (3) "[a]ny other information that might be helpful in establishing the cause of the injury, abuse or neglect that is known or reasonably suspected believed" or any threat thereof. OHIO REV. CODE ANN. § 2151.421(C)(1-3) (LexisNexis 2014). Information about the "cause of the injury" is broad and would include information necessary to identify the abuser and to distinguish between accidental and intentional injury.

In part to vindicate the statute's core purpose to protect children, the Ohio Legislature has also expanded the use of information obtained through the reporting process in criminal proceedings. As already noted, the original version of the statute codified an exemption to the physician-patient privilege for any information obtained by a required reporter. In 1987, pursuant to Substitute Senate Resolution No. 12 and recommendations from a Domestic Relations Task Force, the statute was expanded beyond this initial physician privilege exemption by explicitly permitting use of the report in all criminal proceedings. Accordingly, the statute affirms that "[i]n a criminal proceeding, the report is admissible in evidence in accordance with the Rules of Evidence and is subject to discovery in accordance with the Rules of Criminal Procedure." OHIO REV. CODE ANN. § 2151.421(H)(1) (LexisNexis 2014). Notably, unlike its broad criminal provision, the statute carves out specific exemptions for certain uses in particular civil proceedings. *See id.*

The Ohio Legislature's intention to broadly allow admission of such evidence in criminal proceedings as a means to prosecute offenders, and thus to protect children, is further confirmed by Ohio Rule of Evidence 807, which defines as non-hearsay out-of-court statements made by a child less than 12 years old describing sexual or physical abuse. In short, while not the core purpose of Ohio's legislative scheme, there can be no doubt that criminal prosecution was a necessary and contemplated "adjunct" of Ohio's goal to protect children.

To be sure, criminal prosecution is not the primary purpose of the statute; nor does the statute contemplate that required reporters are acting as prosecutorial arms in carrying out their statutorily mandated duties. *See Yates*, 102 Ohio St. 3d 205, 2004-Ohio-2491, 808 N.E.2d 861, at ¶ 12 ("[T]he primary purpose of reporting is to facilitate the protection of abused and neglected children rather than to punish those who maltreat them."); *Clark*, 137 Ohio St. 3d 346, 2013-Ohio-4731, 999 N.E.2d 592, at ¶ 76 (O'Connor, C.J., dissenting) (explaining that "the duty to report child abuse does not change the primary purpose of the designated professionals' interaction with children" nor does it "deputize mandatory reporters as agents of law enforcement"). Nevertheless, the importance of Ohio's Required Reporter Statute to Ohio's criminal prosecution regime cannot be denied. As the dissent in the decision below remarked, "[t]he General Assembly considered identification and/or prosecution of the

perpetrator to be a necessary and appropriate *adjunct* in providing such protection.'" *Clark*, 137 Ohio St. 3d 346, 2013-Ohio-4731, 999 N.E.2d 592, at ¶ 78 (O'Connor, C.J., dissenting) (emphasis added) (quoting *Yates*, 102 Ohio St. 3d 205, 2004-Ohio-2491, 808 N.E.2d 861, at ¶ 25).

Affirming the Ohio Supreme Court's flawed ruling would compromise the efforts of the Ohio legislature to prevent child abuse from occurring and would discourage future abuse by prosecuting offenders. As the dissent below rightly noted, such a result would impede those legislative goals and threaten the safety of children. *Clark*, 137 Ohio St. 3d 346, 2013-Ohio-4731, 999 N.E.2d 592, at ¶¶ 35-39 (O'Connor, C.J., dissenting).

B. The Required Reporter Statutes of Other States Reflect the Same Goals and Purposes as Those of the Ohio Statute.

Should this Court affirm the ruling of the Ohio Supreme Court, the decision also would have dramatic and harmful effects well beyond Ohio's borders. As Petitioner has previously noted, required reporter statutes are "ubiquitous," and all 50 states and the District of Columbia have statutes that impose mandatory reporting obligations similar to those of the Ohio statute. Pet. at 23. A comprehensive survey of every state's required reporter statute is beyond the scope of this brief. However, examination of representative examples from a diverse group of states (Arkansas, Colorado,

Montana, New York, and Maryland) demonstrates that required reporter statutes consistently contemplate child protection as their primary purpose.

As part of this objective, the admissibility in criminal proceedings of the type of testimony at issue here is often expressly included in the statutory regime. As is the case with the Ohio statute, the existence of this goal in the statutory regime does not render the "primary purpose" of such statutes prosecutorial in nature. Accordingly, courts applying those statutes have made clear that, simply because a person is required to report evidence or statements regarding potential child abuse, does not render such evidence inadmissible in a criminal proceeding. Nevertheless, based on the text of various required reporter statutes, the state's emphasis on the protection of children through prosecutions of child abuse, both civil and criminal, is undeniable.

1. Arkansas

The Arkansas required reporter statute, ARK. CODE ANN. § 12-18-402, is part of the Arkansas Child Maltreatment Act, ARK. CODE ANN. § 12-18-101, *et seq.*, the purpose of which is "to help ensure the health, safety, and welfare of children by modernizing and updating the law related to child abuse and neglect." Further underscoring the Arkansas required reporter statute's overall purpose to protect children, the Act's preface emphasizes that

its goals are to "[e]nsure the immediate screening, safety assessment, and prompt investigation of reports of known or suspected child maltreatment" and "[e]nsure that immediate steps are taken to [p]rotect a maltreated child and any other child under the same care who may also be in danger of maltreatment " ARK. CODE ANN. § 12-18-102(2-3) (2014).

The Child Maltreatment Act is a comprehensive scheme; the required reporter section of the statute mandates that 39 classes of reporters provide immediate notification to the state Child Abuse Hotline if they suspect that a child has been subjected to or has died as a result of maltreatment. One of the Arkansas regime's overarching purposes is to "[e]ncourage the cooperation of state law enforcement officials, courts, and state agencies in the investigation, assessment, *prosecution*, and treatment of child maltreatment." ARK. CODE ANN. § 12-18-102(6) (2014) (emphasis added). To this end, the Ar nsas statute authorizes the Arkansas Depart ent of Human Services, the Department of Arkansas State Police, and other state agencies to conduct investigations, and mandates production to the Department of Human Services of an investigatory report or "any information gathered during the course of the investigation, including statements from witnesses and transcripts of interviews." ARK. CODE ANN. § 12-18-701(c) (2014).

The statute further makes clear that "[t]he report, exclusive of information identifying the

person making the notification, shall be admissible in evidence in any proceeding related to child maltreatment." ARK. CODE ANN. § 12-18-701(f) (2014). Although no Arkansas case has directly addressed the issue of admissibility of required reporter statements in a criminal proceeding, the Supreme Court of Arkansas has held that hearsay statements of abused children, as testified to by a social worker (who qualifies as a "required reporter" under Arkansas law), may be non-testimonial in nature and admissible, so long as the primary purpose was not to aid law enforcement or gather evidence for a future prosecution. *Seely v. State*, 373 Ark. 141, 282 S.W.3d 778, 788 (2008).

2. Colorado

Colorado has similar statutory purposes, and thus similar admissibility standards for statements made to required reporters. The Colorado required reporter statute, COLO. REV. STAT. § 19-3-304, is part of the Colorado Child Protection Act of 1987, COLO. REV. STAT. § 19-3-301, *et seq.* The legislative purpose section of the broader statute notes that "the complete reporting of child abuse is a matter of public concern and that, in enacting this [law], it is the intent of the general assembly to protect the best interests of children of this state and to offer protective services in order to prevent any further harm to a child suffering from abuse," thus demonstrating the importance of child protection to the goals of the Colorado required reporter statute. Colo. Rev. Stat. § 19-3-302 (2014).

The Colorado required reporter provision mandates that any member of one of 27 defined categories of persons who (1) knows or suspects that a child has been subjected to abuse or neglect, or (2) has observed the child being subjected to circumstances or conditions that would reasonably result in abuse or neglect, shall immediately report such information. COLO. REV. STAT. § 19-3-304(1)(a) (2014). That statute reflects the legislature's clear intention that required reporter statements be admissible in legal proceedings by expressly stating that such statements will not be excluded from evidence based upon standard privileges. *See* COLO. REV. STAT. § 19-3-311 (2014) (stating that privilege between patient and physician, patient and registered professional nurse, certified or licensed school psychologist and client, and husband and wife "shall not be a ground for excluding evidence in *any* judicial proceeding resulting from a report pursuant to this part") (emphasis added).

More importantly, subject to exceptions that do not apply in the present context, Colorado law makes clear that written reports of known or suspected child abuse or neglect "shall be admissible as evidence in any proceeding relating to child abuse " COLO. REV. STAT. § 19-3-307(4) (2014). Indeed, Colorado courts have upheld a broad interpretation of § 19-3-307(4) (in direct contrast to the views of the Ohio Supreme Court regarding Ohio's statute), by holding that hearsay statements made to mandatory reporters of child abuse are not necessarily

testimonial for purposes of confrontation clause analysis. *See People v. Phillips*, 315 P.3d 136, 165-66, 2012 COA 176 ¶¶ 135-44 (Colo. App. 2012) (holding that child's statements to public school employees "were not rendered testimonial merely because of their statutory duty to report" because employees were not law enforcement officials and had not been asked to question the child or obtain statements from the child), *cert denied*, *Phillips v. Colorado*, 134 S. Ct. 1325 (2014).

3. New York

The relevant required reporter statute in New York, N.Y. SOC. SERV. LAW § 413, is part of Title 6 of Article 6 of New York's Social Services Law. Title 6 states that, given the "urgent need for effective child protective service to prevent [abused and maltreated children] from suffering further injury and impairment," the purpose of the law is to "encourage more complete reporting of suspected child abuse and maltreatment." To vindicate the larger purpose of child protection, § 413 requires a broad class of professionals to make a report when they have reasonable cause to suspect that (1) a child coming before them in their professional or official capacity is an abused or maltreated child, or (2) the parent, guardian, custodian or other person legally responsible for such child comes before them in their professional or official capacity and states from personal knowledge facts, conditions or circumstances which, if correct, would render the child an abused or maltreated child. N.Y. SOC. SERV.

LAW § 413 (Consol. 2014).

The statute further provides that any report must be made immediately by telephone, with a written report to follow within 48 hours. N.Y. SOC. SERV. LAW § 415 (Consol. 2013). Section 415 further clarifies that "[w]ritten reports from persons or officials required by this title to report shall be admissible in evidence in any proceedings relating to child abuse or maltreatment." N.Y. SOC. SERV. LAW § 415 (Consol. 2013). This principle has been upheld in New York state courts and remains good law. *Cf. People v. Gwaltney*, 140 Misc. 2d 74, 76-77, 530 N.Y.S.2d 437, 439 (N.Y. Sup. Ct. 1988) (holding that caseworker's testimony was admissible under N.Y. SOC. SERV. LAW § 415, which states that written reports from officials or persons required by law to report suspected child abuse are admissible in evidence in any proceeding relating to child abuse or maltreatment). The New York required reporter statute expressly contemplates that the contents of the report may be used in criminal prosecution. *See* N.Y. SOC. SERV. LAW § 422(4)(A) (Consol. 2014) (providing that "[r]eports made pursuant to this title as well as any other information obtained, reports written or photographs taken concerning such reports" may be made available to the district attorney's office or the police "when such official requests such information stating that such information is necessary to conduct a criminal investigation or criminal prosecution of a person").

4. Montana

The Montana required reporter statute, MONT. CODE ANN. § 41-3-201, is found within Title 41, Chapter 3 of the Montana Code addressing minors. The statute specifically states the legislature's intention that "the mandatory reporting of abuse or endangerment cases by professional people and other community members to the appropriate authority will cause the protective services of the state to seek to prevent further abuses, protect and enhance the welfare of these children, and preserve family life whenever appropriate." MONT. CODE ANN. § 41-3-101(2) (2013). The text of the Montana required reporter statute requires a particular class of professionals or government employees who know or have reasonable cause to suspect that a child is abused or neglected to make a prompt report to the Montana Department of Health and Human Services. Mont. Code Ann. § 41-3-201. Such reports must include "the facts that led the person reporting to believe that the child has suffered injury or injuries or willful neglect ." MONT. CODE ANN. § 41-3-201(7(d) (2013).

The Montana statute, while mainly a social services regime, specifically contemplates criminal prosecution of those who commit child abuse. *See* MONT. CODE ANN. § 41-3-106(1) (2013) ("If the evidence indicates violation of the criminal code, it is the responsibility of the county attorney to file appropriate charges against the alleged offender.").

Although there is no specific provision within the statute authorizing admission of reports in criminal proceedings, the Supreme Court of Montana has flatly rejected the argument that required reporter status automatically implicates, and thus prohibits, a required reporter from testifying as to statements made by a child regarding past or ongoing abuse. *See State v. Spencer*, 2007 MT 245, ¶ 19, 339 Mont. 227, 169 P.3d 384 (holding that "[t]here is no indication, however, that the Legislature intended to deputize this litany of professionals and individuals into law enforcement, and we refuse to attach that significance to the duty to report").

5. Maryland

The Maryland required reporter statute, MD. CODE ANN., FAM. LAW § 5-704, instructs health practitioners, police officers, educators, and human service workers who have "reason to believe that a child has been subjected to abuse or neglect" to notify either the local department or the appropriate law enforcement agency, or the head of their respective institutions. MD. CODE ANN., FAM. LAW § 5-704(a)(1-2) (LexisNexis 2014). Such notification includes the provision of both an oral and a written report; among the required contents is "any other information that would help to determine the identity of any individual responsible for the abuse or neglect." MD. CODE ANN., FAM. LAW § 5-704(c)(5) (LexisNexis 2014). The statute contemplates that the contents of the report may be used in a criminal proceeding, as it requires the reporter to provide a

copy of the report to the local State's Attorney. MD. CODE ANN., FAM. LAW § 5-704b(1)(ii)(2) (LexisNexis 2014).

Furthermore, under the Maryland Rules of Criminal Procedure, out-of-court statements made by children under 13 years old are admissible to prove the truth of the matter of child abuse, rape, or sexual assault. MD. CODE ANN., CRIM. PROC. § 11-304(b) (LexisNexis 2014). Importantly, the Maryland Court of Appeals has confirmed that statements made by children to a social worker, who qualifies as a required reporter under Maryland law, are admissible against a defendant in a criminal proceeding, even in circumstances when the police first notified the social worker as to the abuse. *Lawson v. State*, 389 Md. 570, 584-85, 886 A.2d 876, 884-85 (2005).

In short, although the fundamental purpose of these statutes is to protect children, there is no question that one of the many tools made available to the appropriate authorities in each state is the ability to use evidence and testimony secured from the required reporting process in criminal proceedings. As discussed further below, eliminating this crucial tool would also severely hinder the ability of States to prosecute those who would harm our nation's children.

II. THE OHIO SUPREME COURT'S RULING UNDERMINES THE OHIO LEGISLATURE'S POLICY TO PROTECT CHILDREN AND IMPEDES CRIMINAL PROSECUTION IN CASES WHERE CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT.

A. Reading Ohio's Required Reporter Statute *In Pari Materia* with the Laws Against Child Abuse Is Consistent with the Ohio Legislature's Policy to Protect Children.

Ohio's Required Reporter Statute should be read *in pari materia* with the related body of criminal laws under which perpetrators of child abuse are prosecuted.[2] When read together, these laws embody the general policy of the Ohio Legislature to protect children, who often have no voice in the criminal justice system, including

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[2] "Statues *in pari materia* are to be construed together; each legislative act is to be interpreted with reference to the other acts relating to the same matter or subject." Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* § 86 (reprint 2008) (1896). This doctrine has a long and established history in the Court's construction of statutes. *See, e.g. Kohlsaat v. Murphy*, 96 U.S. 153, 160 (1878) (holding that "[r]esort may be had to every part of a statute, or, where there is more than one *in pari materia*, to the whole system, for the purpose of collecting the legislative intention"). Even if not strictly *in pari materia*, courts may construe unrelated, but analogous statutes to "illuminate the general course of legislative policy." 2B Norman Singer & Shambie Singer, *Sutherland Statutory Construction* §53:5 (7th ed. 2007).

through prosecution. In not considering the legislative intent of the battery and child endangerment laws under which the defendant in this case was charged and convicted, the Ohio Supreme Court construed Ohio's Required Reporter Statute in a way that defeats that general policy.

The Supreme Court has recognized that statutory interpretation requires courts to consider the "total corpus of pertinent law." *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250 (1970). Consistent with that guidance, the Ohio Legislature should be presumed in its enactment of Ohio's Required Reporter Statute to have been aware of and to have considered existing legislation on the same subject in pursuit of a uniform and cohesive legislative scheme. *Erlenbaugh, et al. v. United States*, 409 U.S. 239, 244-245 (1972) ("[W]henever Congress passes a new statute, it acts aware of all previous statutes on the same subject.") (citing *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 541-552 (1954)); *In re Marriage of Sager*, 2010 OK Civ. App. 130, ¶ 18, 249 P.3d 91 ("All legislative enactments *in pari materia* are to be interpreted together as forming a single body of law that will fit into a coherent symmetry of legislation.").

As the courts of Ohio have recognized, the language and the legislative history of Ohio's Required Reporter Statute demonstrate that the Ohio Legislature contemplated the existing body of criminal laws under which child abusers are

prosecuted when it created the mandatory duty to report suspected child abuse. *Yates*, 102 Ohio St. 3d 205, 2004-Ohio-2491, 808 N.E.2d 861, at ¶ 24. In this regard, the purpose of Ohio's Require Reporter Statute must be understood as complementing and supplementing the Ohio's Legislature general policy of protecting children through mandatory reporting of suspected abuse to appropriate authorities in aid of prosecution of child abusers.

The Ohio Supreme Court's interpretation goes too far. In holding that a teacher, in fulfilling her statutorily required reporter duties, is an agent of law enforcement when questioning a child about suspected abuse to fulfill her mandatory reporting duty, the Ohio Supreme Court unhinged the certainty in the law that comes from construing Ohio's Required Reporter Statute to achieve the Ohio Legislature's general policy of protecting children from the criminal offenders who abuse and endanger them. If affirmed, the Ohio Supreme Court's interpretation will lead to the perverse result that, because a child victim's statements were made to a required reporter, many cases of child abuse will not be prosecuted or will not result in a conviction.

B. In Many Instances, Child Abuse Will Go Unpunished Without Direct Testimonial Evidence From Required Reporters.

Child abuse is notoriously difficult to prosecute,[3] in large part due to the difficulty in acquiring physical evidence.[4] This difficulty is particularly pronounced in sexual abuse cases where sexual acts, not involving penetration, are unlikely to leave physical marks.[5] Even in cases where physical harm resulted, evidence of this harm is difficult to attain because reporting often happens well after the abuse has occurred and because children heal more quickly.[6] Indeed, in 2006, 53% of

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[3] Jennifer E. Rutherford, *Unspeakable! Crawford v. Washington and Its Effects on Child Victims of Sexual Assault*, 35 SW. U. L. REV. 137, 138 (2005) ("Cases are regularly dismissed, or simply not prosecuted, due to 'a lack of medical or physical evidence, lack of eyewitnesses, and young child witnesses whose competence or credibility were questioned or who were too traumatized to testify. . . .'" (quoting Josephine A. Bulkley, Claire Sandt & Mark Horwitz, "Key Evidentiary Issues in Child Sexual Abuse Cases," *A Judicial Primer On Child Sexual Abuse* 63, 63 (Josephine Bulkley & Claire Sandt eds., 1994)).

[4] Deborah Paruch, *Silencing the Victims in Child Sexual Abuse Prosecutions: The Confrontation Clause and Children's Hearsay Statements Before and After Michigan v. Bryant*, 28 TOURO L. REV. 85 (2012).

[5] Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, 20 Crim. Just. 24, Summer 2005, at 32.

[6] *Id.*

prosecution declinations for child sexual abuse made by U.S. attorneys resulted from weak or inadmissible evidence.[7] Given the hurdles that prosecutors regularly face in successfully prosecuting child abuse, including sexual abuse, mandatory reporter testimony can be the difference between a conviction and an acquittal of an abuser.

Without direct testimony, many criminal child abuse cases cannot be proven beyond a reasonable doubt, allowing even the most heinous abusers to escape conviction. Although the majority rule in the United States is that circumstantial evidence and direct testimonial evidence are given the same weight, there are large categories of cases, which by their very nature, are difficult to prosecute successfully without direct testimonial evidence. For example, even where child abuse has undoubtedly occurred and physical evidence exists, convictions involving two or more potential perpetrators have been overturned because of insufficient evidence to show which individual actually committed the abuse. *See State v. Miley*, 114 Ohio App. 3d 738, 744-45, 684 N.E.2d 102 (1996) (finding that although injuries inflicted upon a child were "horrific" and abuse was "apparent," there was no proof presented, beyond a reasonable doubt, to pinpoint which caretaker was the actual abuser); *State v. Celestino*, No. S-91-50,

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[7] Mark Motivans and Tracey Kyckelhahn, *Federal Prosecution of Child Sex Offenders, 2006*, NCJ 219412, December 2007, at 3.

1993 Ohio App. LEXIS 1544, at *43 (Ohio Ct. App., 6th App. Dist. Mar. 19, 1993) (finding that, although child sexual abuse occurred, "[n]o evidence exists to exclusively identify appellant as the perpetrator of abuse against the child"); *People v. Wong*, 81 N.Y.2d 600, 610, 601 N.Y.S.2d 440 (N.Y. 1993) (ruling that although abuse was "heinous" and culpability of one of the parties was "evident," both defendants' convictions "must be reversed even though that conclusion means that one clearly guilty party will go free").

Circumstantial evidence is often insufficient to convict in cases where it is difficult to distinguish beyond a reasonable doubt between an accident and an abusive act. Even where the fact of injury and the identity of the potential perpetrator is undisputed, direct testimonial evidence is necessary to establish intent or proximate cause. *See State v. Madison*, No. 92AP-1461, 1993 Ohio App. LEXIS 3216, at *13-14 (Ohio Ct. App., 10th App. Dist. June 22, 1993) (finding that a child's injury was as consistent with an accidental fall as with physical abuse and that proximate cause cannot be established); *Kreager v. State*, 252 S.E.2d 1, 1 (Ga. Ct. App. Sept. 18, 1978) (holding that because the "wholly circumstantial" evidence related to head injuries on a child could be consistent with "unexpected childhood scrapes and falls," the defendant could not be convicted for child abuse and voluntary manslaughter).

Direct testimonial evidence is also crucial in a large number of cases where the act itself is unlikely to leave physical marks, even when the defendant has confessed to the crime. *See generally Hayes v. Virginia*, No. 0330-08-1, 2009 Va. App. LEXIS 162 (Apr. 7, 2009) (finding that there was a failure to show that a "touching" occurred, since evidence was not presented to show that there was molestation); *Allen v. Com.*, 287 Va. 68, 74, 752 S.E.2d 856, 860 (2014) (applying the *corpus delicti* rule after defendant confessed to the crime and holding that even though only "slight corroboration" was necessary to convict the defendant for molesting his grandson, the lack of physical evidence and eyewitness testimony prevented the court from affirming the conviction).

The importance of testimony from mandatory reporters to ensure convictions in child abuse cases cannot be underestimated in the many instances where the court finds the child to be incompetent to testify. Although children are generally presumed to be competent,[8] research suggests that "some courts are hesitant to find children competent to testify."[9] Children can be barred from testifying for a number of reasons, including possessing insufficient intelligence or memory, lacking the capacity to

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[8]Jennifer A. Lindt, *Comment, Protecting the Most Vulnerable Victims: Prosecution of Child Sex Offenses in Illinois Post Crawford v. Washington*, 27 N. Ill. U. L. Rev. 95, 108 (2006).

[9] Parvch, *supra* note 4, at 143.

observe, the inability to communicate, and the inability to articulate an understanding of courtroom procedures or to define the difference between truth and falsehood on the stand.[10]

These limitations are more acute for younger children, who may have been traumatized by their abuse and who have not yet developed adequate cognitive skills.[11] A study of four to seven-year-old children found that they were "less than one percent accurate in understanding the terms court, jury, judge, and witness," potentially leading to a finding of incompetency.[12] Even when a child victim is being truthful in their testimony, their inability to express themselves on matters at issue can result in a ruling

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[10] John E. B. Myers, *Children in Court, in Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases* 641, 647 (Marvin Ventrell & Donald N. Duquette eds., 2010). *See also* Paruch, *supra* note 4, at 86, 108 (stating that "courts find young children incompetent to testify on the grounds that they are unable to distinguish the truth from lies or because they are unable to communicate in a traditional courtroom setting" and "[a] court, in determining the competence of a child to testify, will look at the child's ability to understand the difference between right and wrong, reality and fantasy, and truth and lie, as well as the mental abilities and intelligence pertaining to the ability to recount past events").

[11] Allie Phillips, *Child Forensic Interviews After Crawford v. Washington: Testimonial or Not?*, HALF A NATION, Fall 2005, at 7 (Am. Prosecutors Res. Inst. 2005).

[12] *Id.* at 22.

that they are incompetent.[13] Furthermore, in many child abuse cases, a number of years will elapse from the date of abuse to the date of the first proceeding and, as a result, a child's inadequate recollection could lead to an incompetency determination.[14]

Even when children overcome these obstacles and are deemed competent to testify, courts often assume that their testimony is inaccurate.[15] The Court noted this problem in *Kennedy v. Louisiana*, when describing child testimony as being potentially "unreliable, induced, and even imagined." *Kennedy v. Louisiana*, 554 U.S. 407, 443 (2008). The Court went on to explain that child testimony has been the subject of criticism because "the central narrative and account of the crime often comes from the child herself. She and the accused are, in most instances, the only ones present when the crime was committed." *Id.* at 444.

There is also the risk that testimony from children will be unduly dismissed, since even honest children, because of the trauma inflicted on them, can exhibit behavior in court that would suggest to a jury that they are being untruthful. For example,

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[13] *See also* Paruch, *supra* note 4, at 108.

[14] *Id.* at 109.

[15] Myrna S. Raeder, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don't Die and Ways to Facilitate Child Testimony*, 16 WIDENER L. REV. 239, 242 (2010) (stating that "[t]he distrust of child testimony still persists today and is fueled in part by the psychological literature").

children who are the victims of molestation who tell the truth are often the most inconsistent in their testimony.[16] Children can also have their credibility impeached because of their reluctance to answer "I don't know" to a yes or no question.[17] Juries also have a tendency to disbelieve children who report multiple instances of abuse.[18] Despite evidence suggesting that these views are unfounded, it is difficult for prosecutors to dispel these misconceptions during a trial.[19] Since mandatory reporters have a better understanding of the legal system, can better withstand scrutiny on the stand, and are more likely to be believed by a jury, they can be essential witnesses for ensuring that child abusers are convicted, even when child victims are too young or afraid to advocate on their own behalf.

Even when children are deemed competent and their testimony is believed by juries, forcing child victims to testify can severely traumatize them. Studies have shown that testifying can cause "re-victimization" in an abused child,[20] forcing him or her to relive the abuse in the presence of unfamiliar

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[16] Jodi A. Quas, et al., *Repeated Questions, Deception, and Children's True and False Reports of Body Touch*, 12 Child Maltreatment 60 (2007).

[17] Raeder, *supra* note 15, at 250.

[18] *Id.*

[19] *Id.*

[20] Raeder, *supra* note 5, at 32.

strangers and the abuser.[21] Other studies have shown that even where prosecution is successful because of a child's testimony, child victims can feel increased stigma and a sense of guilt and responsibility for sending the abuser to prison.[22] Indeed, in a study that examined over 200 sexual assault victims, those who testified experienced greater "behavioral disturbance"[23] that persisted long-term.[24] Furthermore, use of closed circuit television (CCTV) for testifying is not ideal – not only because it still forces a child to relive the

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[21] *See, e.g., Maryland v. Craig*, 497 U.S. 836, 855 (1990) (discussing the state's interest in protecting the welfare of children and noting the "growing body of academic literature [that] document[s] the psychological trauma suffered by child abuse victims who must testify in court"); Dorothy F. Marsil, et al., *Children as Victims and Witnesses in the Criminal Trial Process: Child Witness Policy: Law Interfacing with Social Science*, 65 LAW & CONTEMP. PROBS. 209, 213 (2002) (noting that "the phenomenon of confrontational stress experienced by children is amply supported by social science evidence" and citing sources).

[22] Rutherford, *supra* note 3, at 146-49.

[23] *Id.*

[24] Jessica Lieboergott Hamblen, *The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim Witnesses*, 21 LAW & PSYCHOL. REV. 139, 168 (1997) ("testifiers continued to exhibit significantly more overall behavior problems in general, and more internalizing problems specifically, than children who had not testified") (also acknowledging that testifying may be both traumatic during the actual giving of the testimony and long-term as well).

trauma and does nothing to prevent stigma from attaching – but because studies show that juries find children who testify through CCTV to be "less believable."[25] Since prosecutors are often unwilling to indict or to prosecute abusers without testimony from the child victim,[26] the psychological and traumatic consequences of forcing children to testify places prosecutors in a difficult position. Testimony from mandatory reporters can obviate this Hobson's choice. Required reporters spare child victims from the trauma of testifying, while providing crucial direct testimonial evidence – that otherwise would be unavailable or insufficient – necessary to convict child abusers, thereby carrying out the full intent and purpose of the statutes enacted to protect children.

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[25] Bruce A. Arrigo & Stacey L. Shipley, Introduction to Forensic Psychology 66 (2d ed. 2005).

[26] John E. B. Myers, Allison D. Redlich, Gail S. Goodman & Lori P. Prizmich, *Jurors' Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 PSYCHOL. PUB. POL'Y & L. 388, 411 (1999) (finding that "prosecutors are reluctant to take child sexual abuse cases to trial unless the victim is available to testify").

CONCLUSION

For the foregoing reasons, the Court should reverse the Ohio Supreme Court's decision.

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November 24, 2014

AMICUS CURIAE BRIEF

No. 13-1352

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

vs.

DARIUS CLARK,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does an individual's obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?

2. Do a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

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IN THE

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. Both parties have filed blanket consents to the filing of *amicus* briefs.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

The State of Ohio has determined, through an exception to its hearsay rule, when the statement of a child regarding violent or sexual abuse will be deemed reliable enough to be introduced in evidence. The decision of the Supreme Court of Ohio in the present case expands the meaning of the Confrontation Clause of the Sixth Amendment far beyond the original understanding of its scope to trump that decision in an important class of cases—statements made by a child to any person who is required by law to report child abuse. This result is contrary to the interests of victims that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On March 17, 2010, Cleveland Head Start teacher Ramona Whitley noticed an apparent injury to the eye of three-year-old L.P. The child had been dropped off at the school by defendant Darius Clark, his mother's boyfriend and pimp. App. to Pet. for Cert. 19a-20a. When she asked, "What happened?" L.P. said he had fallen. When Ms. Whitley noticed additional injuries, she took L.P. to lead teacher Debra Jones, who asked, "Whoa, what happened?" and "Who did this? What happened to you?" L.P. answered "Dee, Dee." To clarify whether Dee was an adult or child, Ms. Jones asked "Is he big or little?" L.P. answered, "Dee is big." *Id.*, at 20a-21a. Dee is the nickname of the defendant.

Ms. Jones took L.P to the supervisor's office, where she observed further injuries. Ms. Whitley then reported the incident to the child-abuse-reporting hotline. The county children's services agency investigated. The next day a social worker confirmed L.P 's injuries, found that his two-year-old sister A.T. had very serious injuries, and took them both to the hospital. *Id.*, at 5a, 21a.

> "A physician determined that L.P had bruising in various stages of development and abrasions consistent with having been struck by a linear object and that A.T. had bruising, burn marks, a swollen hand, and a pattern of sores at her hairline. The physician suspected child abuse and estimated that the injuries occurred between February 28 and March 18, 2010.
>
> "{¶ 11} A grand jury indicted Clark on one count of felonious assault relating to L.P., four counts of felonious assault relating to A.T., two counts of endangering children, and two counts of domestic violence. The trial court declared L.P. incompetent to testify but denied Clark's motion in limine to exclude L.P.'s out-of-court identification statements. Seven witnesses testified regarding the statements made by L.P.: Jody Remington, a Cleveland police detective; Sarah Bolog, a CCDCFS social worker; Howard Little, a CCDCFS intake social worker; Whitley and Jones; the children's maternal grandmother; and the children's maternal great-aunt." *Id.*, at 5a.

As in all American jurisdictions, hearsay is generally inadmissible in Ohio, see Ohio R. Evid. 802, but there are a number of exceptions. One of them is for reports of abuse by children who are unavailable to testify that the court finds have particularized guarantees of trustworthiness under all the circumstances and are supported by independent proof that a sexual or violent act has occurred. See Ohio R. Evid. 807; App. to Pet. for Cert. 64a-65a.

Defendant was convicted of multiple counts of felonious assault, child endangerment, and domestic violence and sentenced to 28 years in prison. He appealed, and the Court of Appeals reversed and remanded for a new trial. App. to Pet. for Cert. 52a.

The Court of Appeals found that the admission of the testimony of the police officer, social workers, and teachers violated the Confrontation Clause. *Id.*, at 58a-63a. That court further found that the admission of the testimony of the grandmother and great-aunt was error under the state's child abuse hearsay exception, Rule 807. See *id.*, at 63a, 68a.

The State sought review of only the holdings regarding the teachers. See *id.*, at 6a. That ruling would preclude testimony by the teachers on retrial. See Reply Brief for the Petitioner (to Brief in Opposition) 2. The Ohio Supreme Court affirmed in a narrowly divided decision. See *id.*, at 17a. Chief Justice O'Connor, dissenting, wrote, "The majority decision creates confusion in our case law, eviscerates Evid.R. 807, and threatens the safety of our children. Not surprisingly, it is also wrong as a matter of federal constitutional law." See *id.*, at 17a. This Court granted certiorari on October 2, 2014.

SUMMARY OF ARGUMENT

Crawford v. *Washington* upended this Court's jurisprudence of the Confrontation Clause, replacing the reliability-based rule of *Ohio* v. *Roberts* with a historical approach based on similarity to the practices the Clause was intended to prohibit. However, *Crawford*'s historical discussion did not pay sufficient attention to early American cases on dying declarations, the primary form of hearsay admissible in criminal cases in the founding era. The early cases uniformly indicate that dying declarations were seen as consistent with the Confrontation Clause, not an exception to it, because the person hearing the statement and not the deceased declarant was considered the "witness" for the purpose of the confrontation right. Given that original

understanding is the entire basis of the *Crawford* rule, the definitions of "witness" and "testimonial" under that rule must conform to that original understanding, notwithstanding any implications to the contrary in *Crawford* or *Davis* v. *Washington*.

For a statement to be "testimonial" for this purpose, it must resemble the forbidden practices in a way that a dying declaration does not. Solemnity alone will not make a statement testimonial, as one of the reasons dying declarations were admitted was *because* they were considered to have solemnity equivalent to an oath. Intent of a declarant to inform the authorities of the identity of the perpetrator, as distinguished from creating admissible evidence to prove guilt in court, is insufficient to make a statement testimonial, as that is the intent of most dying declarants.

A statement by a preschool child to a teacher is far less testimonial, by any definition, than a dying declaration and therefore cannot make the child a witness for the purpose of the Confrontation Clause.

The broad language of *Davis* has been significantly narrowed by *Michigan* v. *Bryant* regarding the principal purpose test. Only a purpose of "creating an out-of-court substitute for trial testimony" now makes a statement testimonial.

Williams v. *Illinois* establishes a precedent controlling in this case, despite the lack of a majority opinion. The plurality and the concurrence, taken together, establish that a statement is not testimonial if it was not taken "for the primary purpose of accusing a targeted individual" (plurality) *and* if it is not "formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting from formalized dialogue, such as custodial interrogation" (concurrence). The teachers' questions to the child in

this case and his answers meet both tests; therefore, the teachers and not the child were the "witnesses" for the purpose of the Confrontation Clause.

ARGUMENT

I. Dying declarations provide key insights into the original understanding of hearsay and the Confrontation Clause, not yet sufficiently appreciated.

Under the since-discarded rule of *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980), the Confrontation Clause of the Sixth Amendment was virtually a constitutionalization of the hearsay rule of evidence law. If a hearsay declaration came within a "firmly rooted hearsay exception" or had "particularized guarantees of trustworthiness," no confrontation of an unavailable declarant would be deemed constitutionally required. See *ibid*. Otherwise, the actual witness in court could not testify to what the declarant said, even though the defendant was fully able to confront that witness.

Roberts was overruled and Confrontation Clause jurisprudence was upended in *Crawford* v. *Washington*, 541 U. S. 36 (2004). *Crawford* instead took a historical approach and found that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused The Sixth Amendment must be interpreted with this focus in mind." *Id*., at 50.

The *Crawford* opinion noted, "This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it

bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Id.*, at 51. "Not all" is a significant understatement. *Most* hearsay bears little resemblance to the historical practices identified in the decision. These practices included pretrial examinations by justices of the peace, *id.*, at 43, the examination by the Privy Council used in the trial of Sir Walter Raleigh, *id.*, at 44, admission of a letter in the same trial, *ibid.*, use of examinations taken by governor-appointed commissioners, *id.*, at 47, and testimony by deposition or private examination in admiralty courts. *Id.*, at 47-48. For the most part, this Court since *Crawford* has applied the Confrontation Clause to statements resembling the historical practices and declined to apply it to those that do not. The exception is the oral statement of the victim in *Hammon* v. *Indiana*, decided with *Davis* v. *Washington*, 547 U. S. 813 (2006). See *id.*, at 840 (Thomas, J., dissenting in part).

Deciding what kinds of hearsay do "implicate[] the Sixth Amendment's core concerns" is not an easy task, but the logical place to start is with hearsay that was generally admissible in the founding era. The most solidly established exception to the hearsay rule in criminal cases in the late eighteenth century and into the nineteenth was the dying declaration, see *Crawford*, 541 U. S., at 56, n. 6., and it would make sense to look there first to see what information may be gleaned regarding the interrelation between the hearsay rule and the Confrontation Clause in the founding era and in the period not too far removed from that era. Oddly, though, the *Crawford* opinion treats dying declarations as a loose end, dropped into a footnote and declared to be acceptable, if at all, only on historical grounds and as *sui generis* rather than establishing principles applicable to other forms of hearsay. See *ibid.* That characterization is unsupported by authority or analysis. Fur-

ther, interpreting the Sixth Amendment in a way that requires an "exception" not contained in the text, see *ibid.*, is highly problematic. If the constitutional mandate is subject to unwritten exceptions, why should the historical one be the only one in perpetuity? If we can make exceptions on the basis of history, why can we not make exceptions on the basis of new knowledge of the types of hearsay that are both reliable and necessary? That is, of course, the road back to *Roberts*. Cf. *id.*, at 62.

Looking more closely at the nineteenth century dying declaration cases, we see that this category of evidence was not seen as an unstated "exception" to the Confrontation Clause at all, but rather as fully consistent with it. An understanding of the Confrontation Clause consistent with these cases is historically more honest, theoretically more sound, and practically less subject to future creation of further nontextual exceptions.

The question should not be "whether the exception for dying declarations survives [this Court's] recent Confrontation Clause decisions." *Michigan* v. *Bryant*, 562 U. S. __, 131 S. Ct. 1143, 1177, 179 L. Ed. 2d 93, 131 (2011) (Ginsburg, J., dissenting). The question should be whether expansive language in those decisions survives a proper analysis of the indisputable admissibility of dying declarations in the founding era.

Woodsides v. *State*, 3 Miss. (2 Howard) 655 (1837) appears to be the earliest reported case squarely addressing a Confrontation Clause challenge to a dying declaration. The state constitution had a provision essentially the same as the Sixth Amendment. See *id.*, at 664-665. The claim was rejected and the evidence was held admissible, but not because of a historical, nontextual "exception" to the right of confrontation.

> "But it is upon the ground alone that the murdered individual is not a witness, that his declarations made *in extremis* can be offered as evidence upon the trial of the accused. If he were, or could be a witness, his declaration, upon the clearest principle, would be inadmissible. His declarations are regarded as facts or circumstances connected with the murder, which, when they are established by oral testimony, the law has declared to be evidence. *It is the individual who swears to the statements of the deceased that is the witness, not the deceased.*" *Id.*, at 665 (emphasis added).

If lawyers in the founding era thought there were a substantial constitutional issue with the admission of dying declarations, we would expect to see it in Virginia. That state adopted a bill of rights including confrontation 15 years before the Sixth Amendment, see *Crawford*, 541 U. S., at 48, and it was initially the largest state with the most cases. *Giles* v. *California*, 554 U. S. 353, 361-362 (2008), noted in a related context that an absence of lawyers even making a particular argument was telling, and absence is what we have in founding-era Virginia. Seven decades after the adoption of the Virginia Declaration of Rights, it was a case of first impression when a defendant claimed a conflict between the confrontation right and the admission of a dying declaration, even though such declarations had been admitted in "constant practice" during that period. See *Hill* v. *Commonwealth*, 43 Va. (2 Gratt.) 594, 607 (1845). With the issue raised, the Virginia Supreme Court specifically declined to reject the argument on historical practice alone, instead saying "this Court is bound to decide it now; not upon practice, but upon principle." *Ibid.*

Deciding the case on principle, the *Hill* court reached the same conclusion as *Woodsides*. "It is analogous

to [the rule] which authorizes the admissions of the prisoner to be given in evidence against him. In that case, he is not the witness; neither is the dead man. His declarations are facts to be proved by witnesses, who must be confronted with the accused." *Id.*, at 608.

We see the same conclusion over and over in ante-bellum cases confronted with confrontation objections to dying declarations.

> "The accused *is confronted* by the witness on his trial. The deceased person is not the witness, but the person who can relate, on the trial, the death-bed declarations, is the witness. The objection, if there be one, is to the competency of the evidence, and not to the want of the personal presence of the witness." *Robbins* v. *State*, 8 Ohio St. 131, 163 (1857).

In other words, this is a hearsay rule question, not a constitutional confrontation question.

> "The argument for the exclusion of the testimony, proceeds upon the idea that the deceased is the witness, when in fact it is the individual who swears to the statements of the deceased, who is the witness. And it is as to *him* that the privileges of an oral and cross examination are secured." *Campbell* v. *State*, 11 Ga. 353, 374 (1852).

Summons v. *State*, 5 Ohio St. 325, 341-342 (1856) makes the same point and notes that it also applies to other hearsay exceptions recognized at that time, including co-conspirator statements, fresh reports of rape victims, and admissions of the accused.

Near the end of the nineteenth century, the highest court of New York declared, citing numerous authorities, "It is *invariably* held that the deceased is not a witness within the meaning of such a provision or of the Bill of Rights, and that it is sufficient if the defendant is confronted with the witness who testifies to the

declaration." *People* v. *Corey*, 157 N. Y. 332, 348, 51 N. E. 1024, 1029 (1898) (emphasis added).[2] Given that historical understanding is the entire foundation of the *Crawford* rule, the meaning of "witness" should certainly conform to the historical understanding of that term as applied to otherwise admissible hearsay, and dying declarations provide the primary window into that understanding.

The first insight we gain from these cases is that solemnity of the statement alone is not sufficient to change a declarant into a witness. For a dying declaration to be admissible, the declarant must know he is at death's door, and the resulting solemnity was regularly cited as a reason *for* admissibility. "[F]or this is supposed to create a solemnity equivalent to an oath." *Commonwealth* v. *Casey*, 65 Mass. (11 Cush.) 417, 421 (1853). It would create a Catch-22 (to use a decidedly twentieth-century term) if the very solemnity that warranted an exception to the hearsay bar operated to invoke the confrontation bar. That result cannot be squared with the historical understanding of dying declarations.

The second insight is that the intent of the declarant to direct the criminal justice system to the perpetrator of the offense so that he may be prosecuted and punished is not sufficient to make the declarant a witness. Of course that typically is the intent of the dying declarant.

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2. There is, to be sure, language to the contrary in *Mattox* v. *United States*, 156 U. S. 237, 243-244 (1895), but this is mere *dictum* as *Mattox* was not a dying declaration case, and it made no examination of those precedents. It is also half a century further removed from the founding than the antebellum cases discussed above.

It may well be that the question of whether the declarant is a "witness" can be equated to the question of whether his statement is "testimonial," see *Crawford*, 541 U. S., at 51, but then "testimonial" must be defined in a way consistent with the historical understanding that the admission of dying declarations is consistent with the confrontation right and not an exception to it. To the extent that understanding differs from Noah Webster's nonlegal definition of "testimony," see *ibid.*, the legal understanding must prevail. The central purpose of the Confrontation Clause is preventing trial by depositions and similar methods, see *id.*, at 50; *Summons* v. *State*, 5 Ohio St., at 340-341, and a hearsay statement cannot be "testimonial" for this purpose unless it resembles a deposition in some material way that a dying declaration does not.

II. A statement by a preschool child to his teacher is far less "testimonial" than a dying declaration and therefore does not make the child a "witness" for the purpose of the Confrontation Clause.

Crawford v. *Washington*, 541 U. S. 36 (2004), and *Davis* v. *Washington*, 547 U. S. 813 (2006), made no attempt to reconcile their definitions of "witness" and "testimonial" with the original understanding that dying declarations are fully compatible with the Confrontation Clause. Broad statements in those cases have already been trimmed back in *Michigan* v. *Bryant*, 562 U. S. __, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011), and may require some further trimming to be consistent with the original understanding.

Davis, 547 U. S., at 822, says,

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

The implication in this statement and elsewhere in the opinion, see *id.*, at 830, that a statement becomes "testimonial" if its purpose is merely to identify the perpetrator to the authorities rather than to build a case to convict him is highly doubtful. Identification of the perpetrator with the intent that the information be conveyed to the authorities, if not made directly to them, is likely the central purpose of most dying declarants.

Bryant significantly narrowed the broad language of *Davis*.

> "But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony
> Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Bryant*, 131 S. Ct., at 1155, 179 L. Ed. 2d, at 107-108.

The *Bryant* Court ultimately decided that the case fit within the primary purpose of meeting an ongoing emergency, see *id.*, 131 S. Ct., at 1166-1167, 179 L. Ed. 2d, at 119, so it was not necessary to explore

what those other circumstances might be, but "creating an out-of-court substitute for trial testimony" is certainly much narrower than "establishing or proving past events potentially relevant to later criminal prosecution," and it is more consistent with the purpose and original understanding of the confrontation right. A substitute for trial testimony would only be for the purpose of proving past events, not establishing them, to the extent that "establishing" implies something broader than or different from "proving."

The *Bryant* Court also considered the formality, or lack of it, in obtaining the statements, see *id.*, 131 S. Ct., at 1166, 179 L. Ed. 2d, at 119, and the concurrence considered this factor alone to be dispositive. See *id.*, 131 S. Ct., at 1167-1168, 179 L. Ed. 2d, at 120 (Thomas, J., concurring in the judgment).

The distinction between building a case against a targeted individual and solving an as-yet unsolved crime was presented in *Williams* v. *Illinois*, 567 U. S. __, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012). That case involved DNA testing before any suspect had been identified. The plurality noted, as one of two alternate grounds, that the testing report "plainly was not prepared for the primary purpose of accusing a targeted individual." *Id.*, 132 S. Ct., at 2243, 183 L. Ed. 2d, at 115; see also *id.*, 132 S. Ct., at 2250-2251, 183 L. Ed. 2d, at 123-124 (Breyer, J., concurring). Such a statement, the plurality held, " 'bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.' " *Id.*, 132 S. Ct., at 2244, 183 L. Ed. 2d, at 116 (quoting *Bryant*, 131 S. Ct., at 1167, 179 L. Ed. 2d, at 120 (Thomas, J., concurring in the judgment)).

Justice Thomas concurred in the judgment, providing the fifth vote for affirmance. This was based on his view that exclusion under the Confrontation Clause is

limited to "formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting from formalized dialogue, such as custodial interrogation." *Id.*, 132 S. Ct., at 2260, 183 L. Ed. 2d, at 133 (citations and internal quotation marks omitted). The rule of *Marks* v. *United States*, 430 U. S. 188, 193 (1977), that the holding of a case with no majority opinion is found in the opinion on the narrower grounds, has proven difficult to apply when neither opinion is unambiguously narrower than the other. For the reasons set forth in our brief in *Grutter* v. *Bollinger*, No. 02-241,[3] *amicus* believes that the precedent formed by such a case requires the same result in any case that shares the characteristics that both opinions concurring in the result found controlling.

With this understanding, the present case is straightforward. It shares all the essential characteristics that part IV of the *Williams* plurality opinion and Justice Thomas's concurrence found necessary to the result. A preschool teacher asking a child the cause of his injury is not accusing anyone or creating evidence for use at trial. See *Williams*, 132 S. Ct., at 2243-2244, 183 L. Ed. 2d, at 115-116. Indeed, until the question is answered, it is most likely that no crime has been committed at all, that the injury either was accidental or was inflicted by a person incapable of criminal culpability, *i.e.*, another preschooler. Even if abuse by an adult is suspected, no individual is targeted at least

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3. Available online at http://www.cjlf.org/briefs/Grutter.pdf.

until the question is answered.[4] As with catching the dangerous rapist at large in *Williams*, the primary purpose quite clearly was protection of the child from further injury. Applying Justice Thomas's test, the teachers' questions and the child's answers in this case do not amount to "formalized dialogue." They are even less so than the questions and answers that Justice Thomas found "highly informal" in *Bryant*, 131 S. Ct., at 1167, 179 L. Ed. 2d, at 120. *Williams* is therefore controlling precedent in this case.

CONCLUSION

The decision of the Ohio Supreme Court should be reversed.

November, 2014

Respectfully submitted,

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Criminal Justice Legal Foundation

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4. Even then, a teacher is not an agent of law enforcement, mandatory reporting statute or not. If mandatory reporting is enough to make a person an agent of law enforcement, then every person in the United States is an agent of law enforcement for federal felonies. See 18 U. S. C. § 4 (misprision). This issue is not further addressed in this brief because it is fully presented in the Brief for Petitioner.

AMICUS CURIAE BRIEF

No. 13-1352

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF *AMICUS CURIAE* DOMESTIC VIOLENCE LEGAL EMPOWERMENT & APPEALS PROJECT (DV LEAP) IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether mandatory reporters of suspected child abuse are agents of law enforcement for purposes of the Confrontation Clause.

Whether a child's out-of-court statements to a teacher in response to questions about the cause of the child's injuries qualify as "testimonial" statements subject to the Confrontation Clause.

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INTEREST OF *AMICUS CURIAE*[1]

The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) is an organization committed to combating domestic violence and child abuse through appellate litigation, trainings, consulting and policy initiatives. DV LEAP has extensive experience working with survivors of domestic violence and protective parents seeking to keep their children safe from abuse through the civil courts. DV LEAP has also filed eight *amicus curiae* briefs in this Court, including two on confrontation rights.

DV LEAP is concerned that an overly expansive interpretation of the Confrontation Clause, such as that adopted by the Ohio Supreme Court, would endanger the safety of victims of domestic violence and children at ongoing risk of abuse, particularly after their parents separate. Most children are required by courts to continue to see their non-residential parent after the parents separate, but family courts are inexpert at determining whether a parent is unsafe. Affirmance of the Ohio Supreme Court's decision—which effectively excludes

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice under Rule 37.2(a) of intent to file this brief was provided to the Petitioner and the Respondent, and both have consented in writing to the filing of this brief.

the testimony of mandatory reporters who witness children's reports of abuse—would deprive civil as well as criminal courts of this critical information in proceedings where children's safety and well-being should be paramount.

SUMMARY OF ARGUMENT

In *Davis v. Washington*, 547 U.S. 813 (2006), the Court articulated general criteria for determining when out-of-court statements made to law enforcement officers should be deemed "testimonial" under the Confrontation Clause. Pertinent here, the test turns on whether the statement is uttered during an "ongoing emergency" where public safety is at risk, *id.* at 822, or, as subsequently characterized in *Michigan v. Bryant*, there remains a "continuing threat" to public safety. 131 S. Ct. 1143, 1159 (2011).

Children's reports of abuse to a teacher, doctor or other civil professional fall into this category. These professionals are not police investigators and, even when subject to a mandatory reporting requirement, their primary function is to protect the child, not to investigate crime. Their role, in this context, is to protect the child from *ongoing threats to the child's safety*—including being returned to the abuser's household when the school day ends. Where an abuser is a family member or other person with continuing access to the child, the danger is, by definition, ongoing.

The Court's decision in this case will not only affect the ability of the criminal justice system to hold abusers accountable, but also the civil justice sys-

tem's ability to protect children from known risks. *Amicus* specializes in work with parents seeking to prevent ongoing abuse of their children by the other parent in the context of civil custody or child protective proceedings. Our experience—and that of most of the domestic violence field, as well as a growing body of research—is that civil courts frequently fail to protect children in such cases. The two primary and related reasons for this failure are that (i) the civil courts are wary of child abuse allegations brought by a custody litigant, and (ii) such claims evoke judicial concerns about criminal liability, triggering an emphasis on protecting the rights of "the accused," rather than the safety of an at-risk child.

This skepticism toward testimony by one custody litigant that the other is abusive makes testimony from independent third parties, when available, critical to protecting the safety of children. The Ohio Supreme Court decision, if affirmed, would thus profoundly tilt even the *civil, protective* playing field against children's safety and in favor of potential perpetrators of abuse.

Finally, admission of children's statements made to third parties has been permitted by courts dating back to the Founding era. The most important Anglo-American criminal court throughout the eighteenth century routinely heard, without objection, parents and doctors testify to suspect-identifying statements made by child rape victims. Those witnesses' involvement with law enforcement during the Founding era cases was very likely more significant, and certainly not less significant, than

that of the mandatory reporters in the case before the Court.

ARGUMENT

I. CHILD ABUSE TYPICALLY INVOLVES ONGOING THREATS TO SAFETY

This case does not involve accusatory statements to police investigators; it involves statements by children to professionals entrusted with their care. When these professionals ask children about bruises, cuts or other indicia of harm, they are doing so to protect the child from a potential "continuing threat" of harm. *Bryant*, 131 S. Ct. at 1159; *see also Davis*, 547 U.S. at 830 (statements providing information to "end a threatening situation" are not covered by the Confrontation Clause).

Social science research is quite clear that both domestic violence and child abuse are recurring in nature and typically committed by a person with continuing access to the victim. Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. Rev. 1, 8 (2006) ("Abuse victims are faced with a threat that is ongoing"); Jane Koziol-McLain et al., *Predictive Validity of a Screen for Partner Violence Against Women*, 21 Am. J. Prev. Med. 93, 99 (2001). Indeed, past physical abuse is probably the best predictor of re-abuse. *See* Lauren B. Cattaneo & Lisa A. Goodman, *Risk Factors for Reabuse in Intimate Partner Violence: A Cross-Disciplinary Critical Review*, 6 Trauma, Violence, & Abuse 141, 142 (2005). The likelihood of repeat-

ed abuse illustrates "the reality of domestic violence [—] that even when a single incident is 'over,' the danger is still ongoing." Joan S. Meier, Davis/Hammon, *Domestic Violence, and the Supreme Court: The Case for Cautions Optimism*, 105 Mich. L. Rev. First Impressions 22, 26 (2006).

Although adult domestic violence is generally understood to occur within the home, a common misconception is the idea that strangers are the most frequent perpetrators of *child* abuse. Mark L. Rosenberg & Mary Ann Fenley, *Violence in America: A Public Health Approach* 84 (1991). In fact, "in almost all studies, [abuse by a stranger] is substantially less common than abuse either by family members or by persons known to the child." David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 The Future of Children 46 (1994). *See* Graham Farrell et al., *Like Taking Candy: Why Does Repeat Victimization Occur?* 35 Brit. J. Criminology, 384, 389 (1995) (estimating that in 80%-86% of sexual abuse cases, the perpetrator is not a stranger); Rosenberg, *supra*, at 84 (16%-42% of child abuse cases involve abuse by other family members, and 32%-60% involve "non-relatives known to the child (including neighbors, family friends, child care workers, and other authorities)").

The potential for recurring abuse by a family member or acquaintance is in part a product of the child's reluctance to report abuse "due to a sense of allegiance to a parent or [acquaintance] whom they do not want to see punished." *See* Rosenberg, *supra*, at 84. Such a perpetrator implicitly has authority or

power over the child (as an adult, often a caregiver), making the child victim especially vulnerable to threats of what will happen if they disclose the abuse. Alternatively, adult perpetrators often calculatingly condition the child to tolerate what the perpetrator establishes as acceptable, a pattern of behavior known as "grooming" the child for victimization, thereby smoothing the path to repeated abuse of the child. *See* Farrell et al., *supra*, at 389. The perpetrator's continued access to the child victim therefore facilitates repeated instances of abuse. *See* John E.B. Myers, *Myers on Evidence of Interpersonal Violence: Child Maltreatment, Intimate Partner Violence, Rape, Stalking, and Elder Abuse* 457 (5th ed. 2011) (noting that because perpetrators of child sexual abuse "often [have] continuing access to the victim, multiple episodes of sexual abuse are common").

Reputable studies thus place the incidence of recurring child abuse at close to or above fifty percent. Suzanne R. Dakil et al., *Recidivism in the Child Protection System: Identifying Children at Greatest Risk of Reabuse Among Those Remaining in the Home*, 165 Archives Pediatric Adolescent Med. 1006, 1008 (2011) (44% of children were re-reported as victims of repeat abuse during five-year study period); Roy C. Herrenkohl et al., *The Repetition of Child Abuse: How Frequently Does It Occur?*, 3 Child Abuse & Neglect 67, 70, 72 (1979) (reporting 54.1% rate of repeated physical child abuse and rates of 66.3% and 85%, respectively, when two and three types of abuse are experienced).

Even these studies likely understate the problem because of the low rates of children's disclosure of abuse. *See, e.g.*, Herrenkohl, *supra*, at 71-72. This is particularly true for sexual abuse, which is a "hidden offense" characterized by secrecy and shame. Myers, *Evidence*, *supra*, at 467-68. Ann-Christin Cederborg et al., *Delay of Disclosure, Minimization and Denial When the Evidence Is Unambiguous: A Multivictim Case, in Child Sexual Abuse: Disclosure, Delay and Denial* 171 (Margaret-Ellen Pipe et al. eds., 2007) ("Children may also minimize, delay disclosure or deny abuse when they are in a secrecy pact with the perpetrator, when they feel responsible for participating, or if they fear punishment by the perpetrator if they tell about their experiences.").

Given the ongoing danger of re-victimization in abusive families, when a teacher, doctor or counselor notices signs of injury and asks a child what happened, the child's response should not be considered "testimonial" under the *Sixth Amendment*, but rather non-testimonial and necessary to protect the child from a "continuing threat" of harm. *Bryant*, 131 S. Ct. at 1157 n.9, 1159.

II. THE OHIO DECISION, IF AFFIRMED, WOULD SIGNIFICANTLY IMPAIR THE PROTECTION OF CHILDREN IN CIVIL PROCEEDINGS

Amicus regularly consults with and represents parents around the country who are, in the context of civil court custody or child welfare proceedings, seeking to prevent ongoing abuse of their children. Domestic violence is a common backdrop for custody and child protection litigation. Affirmance of the Ohio Supreme Court's ruling below would exacerbate the difficulties facing abused children in civil proceedings because the ruling would likely be adopted by many *civil* courts, which tend to discount child abuse allegations as unwelcome criminal claims in a civil context.

A. Protection of Children in Civil Proceedings Is Inconsistent at Best

Domestic violence and child abuse are often not prosecuted criminally, yet arise regularly in civil court cases, such as custody litigation. *See* Judith G. Greenburg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. Ill. U. L. Rev. 403, 411 (2004) ("[C]ases that get to litigation (or even to judicial intervention short of litigation) are exactly those most likely to involve domestic violence."); Janet R. Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families,* 43 Fam. Ct. Rev. 283, 284 (2005) (approximately 75% of contested custody claims have history of domestic violence); Peter Jaffe, Michelle Zerweer, & Samantha Poisson, *Access Denied: The*

Barriers of Violence and Poverty for Abused Women and Their Children's Search for Justice and Community Services After Separation, Center for Child. & Fam. Just. Sys. (2002) (citing multiple studies finding a comparable statistic).

This is due both to the fact that adult and child abuse are logical triggers for divorce and custody litigation,[2] and that, contrary to common belief, the risks of child abuse and domestic violence *increase after separation* of the adult parties. Because domestic violence is about dominance and control of the victim, separation tends to escalate the perpetrator's tactics as he works to regain and extend control over his family members. *See generally* Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007). Thus, scholar Martha Mahoney coined the term "separation assault" to capture the fact, among other things, that women who are separated from their abusers are twenty-five times more likely to be victimized than married women. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 24-30 (1991).

Victims' risks of being killed peak *after* the victim leaves their abuser. Peter Jaffe, Claire Crooks and

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[2] *See, e.g.*, Kathleen Colborn Faller, *Possible Explanations for Child Sexual Abuse in Divorce*, 61 Am. J. Orthopsychiatry 86, 87 (1991) (observing, in part, that a divorce may be precipitated by discovery of sexual abuse and that long-standing sexual victimization may be revealed after a separation).

Samantha Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 Juv. & Fam. Ct. J., Fall 2003, at 59 ("[a]ttempts to leave a violent partner, with children, is one of the most significant factors associated with severe domestic violence and death) (citation omitted).

Children's risks of abuse post-separation, even where there was no prior child abuse, also escalate significantly. Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 Juv. & Fam. Ct. J., no. 4, 1992, at 33-34 ("Abuse of children by batterers may be more likely when the marriage is dissolving, the couple has separated, and the husband and father is highly committed to continued dominance and control of the mother and children.") (citations omitted). "Separation of their parents seems to increase, rather than decrease, children's exposure to violence." Einat Peled, *Parenting by Men Who Abuse Women: Issues and Dilemmas*, 30 Brit. J. Soc. Work 25, 28 (2000). "Indeed, the ongoing risks to abused women and children are so high at the point of separation that supervised visitation centers have become an essential domestic violence service (Sheeran & Hampton, 1999)." Jaffe et al., *Common Misconceptions*, *supra*, at 60. "[E]ven if prior to separation the abuse was only focused on the mother, an abusive partner will ' shift his focus to control of the child as a way to continue the terror and violence against the mother.'" Catriona Shalansky et al., *Abused Women and Child Custody: the Ongoing Exposure to Abusive Ex-Partners*, 29 J. Advanced Nursing 416, 424 (1999) (citation omitted).

In civil proceedings involving child abuse allegations, the purpose is not to adjudicate an accused's guilt or innocence, but rather to assure the "best interests" of the child are prioritized in decisions about the child's care and custody. Elizabeth M. Schneider et al., *Domestic Violence and the Law: Theory and Practice* 531 (2d ed. 2008). Unfortunately, many civil courts lack adequate understanding of domestic violence and child abuse, particularly the facts discussed above. *See* Daniel G. Saunders et al., *Child Custody Evaluators' Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations* 116 (Final Report to Nat'l Inst. Just., NCJRS # 2007-WG-BX-0013) (2012), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf ("The least common [knowledge] area—especially among judges, evaluators, and private attorneys—were post-separation violence, screening, and assessing dangerousness (although the majority nevertheless had knowledge in these areas)."); Jaffe et al., *Common Misconceptions*, *supra*, at 60 (detailing seven common misconceptions about domestic violence and custody which result in harmful outcomes in custody litigation, despite changes in laws).

Like much of society, courts often mistakenly presume that once the adult parties in a battering relationship are separated, the victim and the children are safe. Family courts also understandably prioritize the rights of both litigants to parent their children and tend to see "shared parenting" as the highest value. Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for*

Custody and Visitation Decisions, 54 Juv. & Fam. Ct. J., Fall 2003, at 12.

As a result, *Amicus's* experience, and that of many other organizations and litigants across the country, has been that "[f]amily courts and child protective services often appear skeptical of domestic violence or child abuse allegations brought by women in custody and visitation litigation, believing that such reports are exaggerated for strategic purposes." Lundy Bancroft et al., *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* 154 (2d ed. 2012). *See* Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solution*, 11 Am. U. J. Gender Soc. Pol'y & L. 657, 717 (2003) ("Many judges' and mental health professionals' resistance to taking seriously a battered mother's claims of risk to children is driven, at least in part, by the fact that she is a litigant with a presumed self-interested bias against the opposing party, which casts doubt on all of her claims about the children's welfare").

Even child protection agencies harbor skepticism toward claims of abuse if raised by a custody litigant. *See, e.g.*, U.S. Dep't of Health and Human Servs., *Child Protective Services: A Guide for Caseworkers* at 42 (2003), *available at* www.childwelfare.gov/pubs/usermanuals/cps/cps.pdf ("[C]aseworkers should be alert to separated or divorced parents making allegations against each other."). The practice of child welfare workers' discounting of child abuse claims raised in custody

litigation is well known. *See* Nancy Thoennes & Jessica Pearson, *Summary of Findings from the Sexual Abuse Allegations Project, in Sexual Abuse Allegations in Custody and Visitation Cases 4*, at 6 (E. Nicholson ed., 1988) (caseworkers are sometimes reluctant to investigate allegations of abuse in custody disputes because they assume the cases are "undoubtedly false").

The net effect is that civil proceedings frequently result not only in non-protection of children at risk from abusive parents, but in added exposure to those risks by court orders mandating children to participate in unsupervised custody and visitation time with an abusive parent. Morrill et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 Violence Against Women, no. 8, Aug. 2005, at 1076 (even in states with a presumption against custody to a batterer, 40% of *adjudicated* batterers received joint (legal or physical) custody) (emphasis added); Jay Silverman, Cynthia Mesh, Carrie Cuthberg, Kim Slote and Lundy Bancroft, *Child Custody Determinations in Cases Involving Intimate Partner Violence: a Human Rights Analysis*, 94 Amer. J. Pub. Health, no. 6, June 2004, at 951-56, 953 (18 out of 39 cases resulted in sole or joint physical custody to documented perpetrators of abuse against spouse; 7 also had documented abuse of children); Meier, *Child Custody and Protection, supra*, at 662 n.19, 672-73 (informal survey of appellate decisions found that trial courts awarded joint or sole custody to vast majority of parents accused of and found to have committed abuse, including some who had (i) been repeatedly convicted of domestic assault; (ii)

committed an undisputed choking of the mother resulting in her hospitalization and his arrest; (iii) had broken the mother's collarbone; (iv) had committed "occasional incidents of violence"; and (v) had committed two admitted assaults) (case citations omitted). In the pilot study for a recently awarded National Institute of Justice grant, forty percent of litigants found to have committed domestic violence still won their custody case. Joan S. Meier, *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations* (Report to Nat'l Inst. Just., NIJ-2014-3749) (on file with author). *See also* Michael S. Davis et al., *Custody Evaluations When There Are Allegations of Domestic Violence: Practices, Beliefs, and Recommendations of Professional Evaluators* 80, (Final Report to Nat'l Inst. Just., NCJRS # 2007-WG-BX-0001) (2001), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf ("Most surprising, the safety of the parenting plans did not appear to be affected by the characteristics of the case: that is, when the domestic violence had been more severe, the parenting plans were no more protective of the mother or child than if the physical and emotional abuse, threats and stalking had not been so severe.").

Thus, the Leadership Council on Child Abuse and Interpersonal Violence — a network of leading scholars and experts on abuse in the family — estimates that 58,000 children a year are placed in the care or custody of an abusive parent. *See* Joyanna Silberg, The Leadership Council on Child Abuse and Interpersonal Violence, *How Many Children Are Court-Ordered into Unsupervised Contact with an Abusive Parent After Divorce?* (Sept. 22, 2008)

("[W]hen courts get involved in determining custody, children are rarely protected from the violent parent. In at least 75% of cases the child is ordered into unsupervised contact with the alleged abuser. (Research has found results ranging from 56-90%; a conservative estimate is 75%).") (citations omitted), http://leadershipcouncil.org/1/med/PR3.html.

The severity of the problem in the nation's custody courts has reached the attention of the federal government, which has stated that "[b]attered women continue to lose custody of their children because many family courts do not take domestic violence into account in their decision-making. Children continue to be placed in unsafe environments because the system fails to adequately assess and address the impact of domestic violence on the children."[3] In recognition of the problem, the Department of Justice has been funding a growing number of research studies and programs aimed at informing and improving family court responses to custody and abuse cases.[4]

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[3] *Violence Against Women Act Grants, Fiscal Year 2014 Performance Budget*, U.S. Dept. of Just., Office of Violence Against Women (Mar. 27, 2013), http://www.justice.gov/sites/default/files/jmd/legacy/2013/09/26/ovw-justification.docx.

[4] *See, e.g.*, *Projects Funded Under Fiscal Year 2014 Solicitations*, Nat'l Inst. Just., http://www.nij.gov/funding/awards/pages/award-detail.aspx?award=2014-MU-CX-0859) (last visited Nov. 20, 2014); *Solicitation: Research and Evaluation on Children Exposed to Family Violence*, U.S. Dept. of Just., Nat'l Inst. Just., OMB No. 1121-0329, https://www.ncjrs.gov/pdffiles1/nij/sl000928.pdf (last

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B. Civil Courts Often Respond to Child Abuse Allegations as Though Criminal Defendants' Rights Are at Stake, Making It Harder To Protect At-Risk Children.

Although in *Crawford v. Washington*, 541 U.S. 36, 51 (2004), this Court observed that the Confrontation Clause does not control civil evidentiary rules as a matter of law, *Amicus* has found that it often does so as a matter of practice. The Court's ruling in this case will therefore have a significant effect on civil courts' protection of children from ongoing abuse.

As scholars and advocates have widely recognized, "[a]n allegation of sexual [or child] abuse in a

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visited Nov. 20, 2014); *OVW Fiscal Year 2014 Family Court Enhancement Project Application Guidelines*, U.S. Dept. of Just., Office of Violence Against Women, OMB No. 1122-0020 (July 2, 2014), http://www.justice.gov/sites/default/files/pages/attachments/2014/09/30/fy14-fcep-application-guidelines.pdf; *VAWA 2013 Summary: Changes to OVW-Administered Grant Programs*, U.S. Dept. of Just., Office of Violence Against Women (Oct. 1, 2013), http://www.justice.gov/sites/default/files/ovw/legacy/2014/06/16/VAWA-2013-grant-programs-summary.pdf (new grant program to improve civil and criminal justice system response to families with histories of domestic violence, sexual assault, dating violence, stalking, and cases involving allegations of child sexual abuse); *Professor Meier Awarded NIJ Grant to Research Domestic Violence Allegations in Custody Cases*, Geo. Wash. U. L., http://www.law.gwu.edu/News/newsstories/Pages/2014_Meier_NIJ_DV_grant.aspx (last visited Nov. 20, 2014).

divorce or custody proceeding introduces a criminal allegation into a civil proceeding." Catherine Paquette, *Handling Sexual Abuse Allegations in Child Custody Cases*, 25 New Eng. L. Rev. 1415, 1437 (1991) (citation omitted); John E.B. Myers, *Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection*, 28 J. Fam. L. 1, 25 (1989/1990) ("Skepticism regarding allegations arising in custody litigation may be reinforced through unwarranted comparisons between custody litigation and criminal litigation."). In these cases the courts often implicitly—and sometimes explicitly—require an elevated level of proof for allegations of abuse. *See, e.g., In re Christine H.*, 451 N.Y.S.2d 983, 986 (Fam. Ct. 1982) (holding, in child protective action, that "the private interests affected by the proceeding are the stigma of child abuse, possible criminal prosecutions, and possible termination of parental rights," and replacing the "preponderance test" with "clear and convincing" standard of proof). "[G]iven the inflammatory character of a charge of child sexual abuse, as well as the fact that the accused parent's right to maintain a relationship with the child is at stake, the alleging parent's standard of proof [in a civil custody suit], realistically, is more akin to that of a criminal case, requiring proof beyond a reasonable doubt." Meredith Sherman Fahn, *Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter*, 14 Women's Rts. L. Rep. 123, 130-31 (1992).

Amicus has observed this phenomenon in our own practice. *See, e.g., Ferguson v. Wilkins*, 928 A.2d 655, 664 (D.C. 2007) (reversing trial court hold-

ing that, despite child's repeated reports of father's abuse, the absence of coaching by mother, and multiple experts' concerned opinions, there was "insufficient evidence to conclude that Mr. Ferguson engaged in inappropriate touching or conduct with his child").

Some courts go even further, explicitly limiting the admissible evidence of child abuse they will consider by applying the Confrontation Clause to custody proceedings. For example, Mississippi courts have expressly held that the Sixth Amendment's Confrontation Clause affords *civil* litigants in child custody cases the right to confront witnesses against them. *See Bailey v. Woodcock*, 574 So.2d 1369, 1374 (Miss. 1990) ("This is not a criminal case, but we are of the opinion that the right of confrontation should be accorded to an accused parent in such cases as this. The fact that the accusation is a terrible and shameful one ought not blind us to the plight of one who may stand wrongfully accused."); *cf. In re Interest of T.S.*, 732 S.E.2d 541, 542 (Ga. Ct. App. 2012) (relying on Confrontation Clause language from a criminal case to define the right to confrontation in a civil parental termination hearing).

Other courts hold that the right to confrontation is protected under the Due Process Clause. Georgia, Kentucky, Massachusetts, and Texas courts, among others, have found such a right to confrontation in a civil litigation context, again rooted in the Due Process Clause. *See, e.g., In re T.S.*, 732 S.E.2d at 542; *Cabinet for Health and Family Servs. v. A.G.G.*, 190 S.W.3d 338, 345 (Ky. 2006) ("A civil litigant's right of confrontation and cross-examination is grounded in

the Due Process Clauses of the Fifth and Fourteenth Amendments."); *In re Adoption of Mary*, 610 N.E.2d 898, 901 (Mass. 1993) ("Due process concerns and fundamental fairness require that a parent have an opportunity effectively to rebut adverse allegations concerning child-rearing capabilities."); *Davidson v. Great Nat'l Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987) (emphasizing that longstanding jurisprudential principles demonstrate that "[d]ue process requires an opportunity to confront and cross-examine adverse witnesses"); *In re S.P.*, 168 S.W.3d 197, 206 (Tex. App. 2005) (citing cases in which courts have held "cross-examination is normally part of the meaningful hearing requirement inherent in principles of due process.").

C. Evidence from Third Party Professionals, Including Mandated Reporters, Is Critical in Proving Child Abuse.

Given both civil courts' protectiveness of the rights of parents accused of abuse, and their skepticism of parents' accusations of each other, the Court's decision in this case on child statements to mandatory reporters will have a direct impact on civil courts' protection of children from parental abuse. Statements made by a child to a mandatory reporter are often the only *extra-parental* source of evidence of abuse. In 2005, over one-half of reports of child maltreatment (61.7%) were from professionals who are considered "mandated reporters." *See Child Abuse and Neglect Statistics*, Am. Humane Ass'n (2013), http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/child-abuse-and-neglect-statistics.html.

A recent federally-funded study highlights the importance of third-party professionals' opinions in protecting children. Joyanna Silberg et al., *Crisis in Family Court: Lessons from Turned Around Cases* (Final Report to Office of Violence Against Women, # 2011-TA-AX-K006) (2013). The authors analyzed twenty-seven custody cases involving parental allegations of child abuse initially determined by a court to be false, resulting in an order granting custody to the alleged abuser. *The abuse claims were later found by another court to have been valid.* In analyzing the factors that caused the incorrect initial determinations, the authors found that the child's disclosure at Time 1 was always to the non-offending mother; in most, the judge found the mother's reports not credible (78%) and many judges (67%) characterized the mother as pathological. In most of these cases, it was only subsequent testimony (years later) by independent experts—particularly mandatory reporters—that removed the child from ongoing abuse. "The main reason that [these] cases turned around was because protective parents were able to present evidence of the abuse and back the evidence up with reports by professionals who were able to dispel the misinformation and myths promulgated [in the first proceeding]." *Id.* at 42.

In short, reports of independent third parties, such as the teacher in this case, are often indispensable to protecting children in *non-criminal* proceedings, where children's best interests should be the priority. Since, in practice, Confrontation Clause jurisprudence can have a spillover effect on civil proceedings, the ruling below would impede child protection even in civil courts.

III. UNAVAILABLE CHILDREN'S STATEMENTS TO AUTHORITY FIGURES WERE REGULARLY ADMITTED IN THE FOUNDING ERA.

Common law from the Founding era—an established guide to the scope of the Confrontation Clause—counsels strongly in favor of admitting the testimony of an authority figure about out-of-court statements made by an unavailable child. The courts of Old Bailey routinely accepted, without objection, the testimony of parents and doctors about identifications made by young rape victims. They did so even when the parents and doctors were acting with or as an investigator or prosecutor, in a far more "state-involved" role than the mandatory reporter in the case before this Court.

A. This Court Has Relied on Founding Era Common Law to Establish the Parameters of the Sixth Amendment's Confrontation Right.

Pre-Founding common law has played a decisive role in Confrontation Clause jurisprudence. In *Crawford,* this Court emphasized the historical reading of the Sixth Amendment's right of confrontation, holding that the clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." 541 U.S. at 54; *see also Salinger v. United States*, 272 U.S. 542, 548 (1926) ("The purpose of [the Confrontation Clause], this court often has said, is to continue and preserve that [common-law] right, and not to broaden it or disturb the exceptions."); *Mattox v. United States*, 156 U.S. 237,

243 (1895) (interpreting Confrontation Clause as "securing to every individual such [rights] as he already possessed as a British subject..."). In the ensuing decade, this Court has continued to look to history as a guide. *See, e.g.*, *Giles v. California*, 554 U.S. 353, 358 (2008) ("We therefore ask whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right.").

B. Pre-Founding Criminal Cases Consistently Allowed Parents and Doctors To Testify to the Accusatory Statements of Unavailable Child-Victims.

Founding era common law routinely allowed authority figures charged with protecting the child—such as parents or doctors—to testify to unavailable child-victims' out-of-court statements. This doctrine is best reflected in the Old Bailey Sessions Papers, pamphlet publications summarizing the proceedings of the Old Bailey.[5] "As the court with jurisdiction over cases of serious crime in metropolitan London, the Old Bailey was the most important criminal court in the Anglo-American world throughout the eight-

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[5] A near-complete collection of the Old Bailey Session Papers (OBSP) reports is available online in a searchable format at www.oldbaileyonline.org. Citations herein to cases reported in the OBSP will begin with the defendant's surname, followed by notation that the case is found in the OBSP, the case's date, and the online case reference number that allows retrieval of the report at www.oldbaileyonline.org.

eenth century." John H. Langbein, *The Origins of Adversary Criminal Trial* vii (2003). The jurists who presided over trials at the Old Bailey included the Twelve Judges, who also sat on the regional assize circuits. *See id.* at 172, 181. "Hence, while the special problems of the metropolis shaped the trial procedure that we see in the Old Bailey, there was no means of confining the developments to London. What was created was not London law but English law." *Id.* at 181.

A recent study of all child rape cases reported in the Old Bailey Session Papers from 1684 to 1789 identified twenty-two cases in which thirty witnesses repeated children's out-of-court statements with no mention of any testimony by the child, either sworn or unsworn.[6] Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 Ind. L.J. 1029, 1041 (2007). All but one of these twenty-two cases were decided well after 1696, the date this Court treats as the settled recognition of the confrontation requirement at common law. *See Crawford*, 541 U.S. at 45-46 (stating that the "widely reported" case of *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (1696), "settled the rule requiring a prior opportunity for cross-examination as a matter of common law").

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[6] One report, *Davids*, OBSP (Dec. 5, 1759) (t17591205-25), covers three trials of the same defendant. In the second trial, for the alleged rape of Sarah Jacobs, the child testified unsworn. That trial is accordingly excluded from the study; the first and third trials in the report are included.

The typical witnesses in the twenty-two prosecutions were either family members of the victim or doctors. Family members often learned of the child's injuries and, in seventeen cases, testified to the child's defendant-identifying statements.[7]

Influential treatises from the period record and approve this practice, making specific reference to children's statements to their parents, and thus likely reflecting the frequency of this fact pattern. Sir Matthew Hale's treatise, which was written in the late 1600s but not published until 1736, noted that "if the child complains presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken." 1 Matthew Hale, *The History of the Pleas of the Crown* 634 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736). Echoing Hale, Sir William Blackstone noted that "the law allows what the child told her mother, or other rela-

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[7] *See Fyson*, OBSP (June 25, 1788) (t17880625-93); *Ketteridge*, OBSP (Sept. 15, 1779) (t17790915-18); *Allam*, OBSP (Sept. 7, 1768) (t17680907-40); *Spicer*, OBSP (Dec. 9, 1767) (t17671209-64); *Brown*, OBSP (June 3, 1767) (t17670603-52); *Tibbel*, OBSP (Oct. 16, 1765) (t17651016-2); *Davids*, OBSP (Dec. 5, 1759) (t17591205-25) (first trial); *Davids*, OBSP (Dec. 5, 1759) (t17591205-25) (third trial); *Crosby*, OBSP (Dec. 7, 1757) (t17571207-14); *Kirk*, OBSP (May 30, 1754) (t17540530-36); *Moulcer*, OBSP (Oct. 17, 1744) (t17441017-25); *Senor*, OBSP (Aug. 28, 1741) (t17410828-63); *Gray*, OBSP (Sept. 11, 1735) (t17350911-53); *Padget*, OBSP (Feb. 22, 1727) (t17270222-72); *Nichols*, OBSP (Feb. 26, 1724) (t17240226-73); *Hullock*, OBSP (Aug. 28, 1723) (t17230828-64); *Robbins*, OBSP (Jan. 13, 1721) (t17210113-28).

tions, to be given in evidence." 4 William Blackstone, *Commentaries on the Laws of England* 214 (Oxford, Clarendon Press 1769).

Medical personnel testimony was likewise a key feature of common law rape prosecutions—indeed, only three of the twenty-two cases fail to mention "surgeons." Doctors would typically opine on whether both the child and the victim had "the foul disease," gonorrhea, and whether there was evidence of penetration, a necessary element of this capital felony. Four cases feature a surgeon testifying to the child victim's accusatory statements, each without record of any complaint or qualification.[8]

In one 1754 case that received relatively lengthy treatment in the Old Bailey Session Papers, defendant William Kirk was indicted for raping a girl under the age of seven. *See Kirk*, OBSP (May 30, 1754) (t17540530-36). The reporter begins by noting "[t]he child being so young and not knowing the nature of an oath, [she] could not be examined." *Id.* The jury instead heard the testimony of five witnesses, including two surgeons. The first surgeon testified that after being summoned by the local justice of the peace, he examined the victim with the justice and another surgeon, finding the child had been forcibly entered and likely had a venereal disease. Afterwards, seem-

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[8] *See Kirk*, OBSP (May 30, 1754) (t17540530-36); *Tankling*, OBSP (July 11, 1750) (t17500711-25); *Nichols*, OBSP (Feb. 26, 1724) (t17240226-73); *Row*, OBSP (Dec. 7, 1687) (t16871207-30).

ingly within the same house,[9] the surgeons examined the defendant's anatomy and found that his venereal disease had advanced to a point that they initially questioned whether he was capable of the crime. After the first surgeon was cross-examined, the second surgeon testified on the same points but also recounted the victim's accusatory statement: "The child told me Mr. Kirk used to set her upon his knee, and used to put his finger into her." *Id.* Nothing in the papers reflects any objection or comment from the court.[10]

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[9] The record makes clear, however, that the defendant was not present during the child's statement. The second surgeon begins his testimony: "I was at Justice Cox's, and went up stairs with the mother and the child." After examining the child, he recounts: "Then I said it would be proper to inspect Mr. Kirk if he will give us leave."

[10] Ultimately the defendant was acquitted: "There being no other evidence against the prisoner than hearsay from the child's mouth it was not judged sufficient; he was therefore acquitted, but detained to be tried on another indictment at Hick's Hall for an assault, with an intent to commit a rape." *Kirk*, OBSP (July 11, 1750) (t17500711-25). This acquittal-but-detention pattern is seen throughout the cases. Children's hearsay testimony appears to have been admissible, yet often insufficient, evidence to support conviction for the capital felony of rape (although it could support a conviction for the misdemeanor offense, as some reports explicitly bear out). *See, e.g.*, *Tankling*, OBSP (July 11, 1750) (t17500711-25); *Nichols*, OBSP (Feb. 26, 1724) (t17240226-73).

Although their records are less comprehensive than the account in *Kirk*, other cases similarly report a surgeon testifying to the identifying statements of the child victim without any indication of a confrontation problem. *See Tankling*, OBSP (July 11, 1750) (t17500711-25) ("The child said, the prisoner hurt her very much"); *Nichols*, OBSP (Feb. 26, 1724) (t17240226-73) ("that the child did say it had been done to her by the Prisoner"); *Row*, OBSP (Dec. 7, 1687) (t16871207-30) ("that when he looked after the Child, the girl said the Prisoner did it").

It is notable that the surgeons in *Kirk* conducted their examinations at the direction of the justice of the peace. That the surgeon's role could intertwine to some extent with the investigative function performed by the justice of the peace was not unique to that type of witness. Parents and family members, too, often testified not merely as father or mother but as prosecutor and prosecutrix. *See* John H. Langbein, *The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors*, 58 Cambridge L.J. 314, 314 (1999) ("The victim of the crime [or at times his/her kin] usually served as the prosecutor."). For example, in *Brown*, a surgeon testified that "the prosecutrix" (the mother) sent for him to examine her daughter (the victim). *See Brown*, OBSP (June 3, 1767) (t17670603-52). The prosecutrix-mother in that case also served as a witness and testified to what her daughter, out of court, said: "I examined her; she told me about the prisoner, and what he had done." *Id.*; *see also Senor*, OBSP (Aug. 28, 1741) (t17410828-63) (witness referring to the mother as "the Prosecutrix"). Like doctors, the parent witnesses often played a partly prosecutorial role,

but the statements of children to these authority figures were nonetheless admitted without concern that the confrontation right was at issue.

The law in this area did evolve at the end of the eighteenth century, and even then did not upend the principles above. The major development came when the Twelve Judges, in *Brasier*, officially rejected the presumption that, based on age alone, children were incompetent to testify—a topic of legal debate at the time. *See King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (K.B. 1779).[11] The trial judge in that rape prosecution presumed the seven-year-old victim incompetent to testify, and therefore allowed the victim's mother to testify to the child's allegations of rape. The Twelve Judges reversed the conviction, holding that the court should have assessed the child's competency before allowing the mother to testify. As the child might have been competent to testify, there was no necessity shown for the mother to testify in the child's place.

Post-*Brasier* cases confirm that *Brasier*'s ruling affected the presumption of child incompetence rather than the admissibility of hearsay statements. For example, four months after *Brasier* was decided, one of the Twelve Judges, Sir Beaumont Hotham,

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[11] Although a number of versions of *Brasier* were reported after the case was decided, the Court has consistently referred to the versions cited in the text above. *See Bryant*, 131 S. Ct. at 1155 n.3 (2011); *id.* at 1173 (Scalia, J., dissenting); *Davis*, 547 U.S. at 828; *Crawford*, 541 U.S. at 69 (Rehnquist, J., concurring); *Wheeler v. United States*, 159 U.S. 523, 525 (1895) (citing only to 1 Leach 199).

Baron of the Court of Exchequer, presided over a child rape case at Old Bailey. *See Ketteridge*, OBSP (Sept. 15, 1779) (t17790915-18). Following *Brasier*, Baron Hotham did not presume the four-year-old victim to be incompetent; rather, he attempted to qualify the child to take the oath. *See id.* When the young victim failed to qualify, Baron Hotham allowed the mother to testify to the child's reports of abuse. *Id.*; *see also Fyson*, OBSP (June 25, 1788) (t17880625-93) (allowing the victim's parent to testify to the child's reports of abuse after first attempting to qualify the child to take the oath, but finding the child incompetent); *R. v. Guttridges*, 9 Car. & P. 471, 472, 173 Eng. Rep. 916, 917 (1840) ("At the time of Brazier's case, it seems to have been considered, that, as the child was incompetent to take an oath, what she said was receivable in evidence.") (citation omitted).[12]

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[12] Modern legal scholarship also recognizes that *Brasier* does not implicate the Confrontation Clause or the admissibility of hearsay statements. *See, e.g.*, Anthony J. Franze, *The Confrontation Clause and Originalism: Lessons from* King v. Brasier, 15 J.L. & Pol'y 495, 500 (2007) ("[*Brasier*] has no place in confrontation doctrine, under an originalist approach or otherwise."); Randolph N. Jonakait, *The (Futile) Search for A Common Law Right of Confrontation: Beyond* Brasier's *Irrelevance to (Perhaps) Relevant American Cases*, 15 J.L. & Pol'y 471, 474 (2007); Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 Ind. L.J. 1029, 1032 ("[T]reatises published after *Brasier*...show that virtually without exception, they interpreted *Brasier* as changing the rules for qualifying child witnesses but not the acceptability of hearsay when a child could not testify."). *But see* Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban*

(cont'd)

Thus, before and after *Brasier*, the Founding era common law routinely admitted the statements of unavailable victims in child abuse prosecutions through the testimony of authority figures charged with protecting them. There was no discussion of a confrontation violation when authority figures like doctors or parents testified, even when those witnesses frequently played a role in investigation and prosecution—no smaller (and likely greater[13]) role than the mandatory reporter in the case before the Court.

CONCLUSION

The Court should reverse the Ohio Supreme Court and hold that the out-of-court statements by the child are not subject to the Confrontation Clause.

(cont'd from previous page)
Against Hearsay Evidence Refutes the Crawford-Davis *"Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & Pol'y 349, 443 (2007); Richard D. Friedman, Crawford, Davis, *and Way Beyond*, 15 J.L. & Pol'y 553, 565 (2007).

[13] "Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption"—here, mandatory reporters—"involves some degree of estimation." *Crawford*, 541 U.S. at 52 n.3.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1352

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF THE FAMILY DEFENSE CENTER AND OTHER ADVOCATES FOR FAMILIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are a collection of non-profit advocacy organizations and law professors with a strong interest in protecting the rights of families.

The Family Defense Center is a not-for-profit legal advocacy organization whose mission is to help families involved with the child welfare system receive just outcomes. The Center defends children who can safely stay with their own families and helps families preserve the right to raise their own children. The Center also works in areas of policy advocacy, community legal education, and systemic reform litigation. The Center supports the respondent in this case based on its extensive work on behalf of children and families subjected to traumatic investigations that harm children instead of protecting them.

Established in 1990, the New York University School of Law Family Defense Clinic was the first law school clinic in the country to train students to represent parents accused of child abuse and neglect and prevent the unnecessary break-up of indigent families. A pioneer of interdisciplinary representation in the field, the Clinic teaches law and graduate-level social work students to collaborate to protect family integrity and help families access services that keep children safe and out of foster care. Under supervision, Clinic students represent parents in New York City Family Courts in child abuse and neglect and

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity has made any monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

termination of parental rights proceedings. Clinic faculty teach, research, and write in the field of child welfare, advocate for policy reform, and train and provide technical support to parent advocates across the country.

Youth, Rights and Justice, Attorneys at Law (YRJ) (formerly Juvenile Rights Project, Inc.) has been the provider of indigent juvenile defense representation in the Multnomah County (Portland) Juvenile Court since 1976. YRJ also provides statewide advocacy on issues affecting children and families, particularly in the legislative arena. YRJ is appointed to provide indigent representation in approximately 1250 cases per year. YRJ represents both children and parents in dependency and termination of parental rights cases and youth in delinquency cases. YRJ supports the respondent in this case because, in its representation of dependent children, parents and delinquent youth, it has seen the harms that occur when there is undue reliance on statements elicited from children by untrained questioners. When false allegations arise from this kind of questioning, children can be unnecessarily suspended in foster care for lengthy periods of time, families can be unnecessarily separated and older siblings can be subjected to criminal charges, including automatic waiver to adult court and mandatory minimum sentences.

The University of the District of Columbia David A. Clarke School of Law General Practice Clinic is a law school clinic in which students represent parents of children involved in the child welfare system. The clinic is directed by Matthew I. Fraidin, Professor of Law. Professor Fraidin is an expert in the area of child abuse and neglect, having written extensively on the subject and previously served as the Legal Di-

rector for the Children's Law Center in Washington, D.C.

The Family Advocacy Movement is a national collaboration of parents, grandparents, family advocates, and other professionals who are committed to reforming the child welfare system by emphasizing the value of families. The Family Advocacy Movement seeks to protect the rights and stability of families and children.

Tanya Asim Cooper, Esq., is an Assistant Professor of Clinical Legal Instruction and the Director of the Domestic Violence Law Clinic at the University of Alabama School of Law. Before joining the law school's faculty, Professor Cooper worked as a Clinical Instructor in the HIV/AIDS Legal Clinic at the University of the District of Columbia's David A. Clarke School of Law, where she worked to reunify families in civil proceedings in the District of Columbia, and as a staff attorney at the Children's Law Center in Washington, D.C.

Amici submit this brief to highlight the harms traceable to relying on the unreliable statements that untrained questioners elicit from young children. *Amici* urge the Court to protect the integrity of investigations of child abuse—and thus to protect the integrity of the family—by ensuring that criminal convictions are not based on statements obtained through improper suggestion. *Amici*'s experience in the civil context has shown that false statements can destroy families and harm children when those accused of abuse are not afforded sufficient procedural protections.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ohio's mandatory reporting regime relies on teachers, physicians, and others to trigger and generate reports for criminal investigations of suspected child abuse. Mandatory reporting is a solemn business: those subject to the regime who fail to report suspected abuse face liability, as do those who knowingly file false reports. Conscientious reporters therefore seek to elicit statements from children that may confirm their suspicions when they observe a child who has been injured in any way. Those statements become an integral part of the report, which is intended for use in the subsequent criminal trial by statutory design. *See* Ohio Rev. Code § 2151.421(H)(1). When the reporting regime works as intended, teachers and other mandatory reporters gather statements confirming their suspicions *ex parte* and those statements are introduced through the reporters as surrogates at trial.

The problem, however, is that the statements that laypersons elicit from young children tend to be unreliable. Young children are highly susceptible to suggestion as a result of their developing mental and neurological capacities. Unless interviewed by a trained professional, a young child will often provide an account that reflects the questioner's perceived expectations rather than the child's memories or experience. And even with proper training, teachers in particular may be unable to avoid the problem of suggestion because of the teacher's dual role as role model and authority figure. Children are trained from a very young age to meet a teacher's expectations and provide what they perceive to be the "right" answer to a teacher's questions, even if that answer is untrue.

Unintentional suggestion can lead children to provide false accounts of abuse, sometimes with disastrous results. When false accounts lead to false convictions, an innocent man or woman may face decades in prison for a crime that he or she did not commit, or that never occurred at all. Families can be torn apart, and children who are led to provide a false account may be tormented for the rest of their lives. Some are plagued by the anxiety that they, too, may be falsely accused of abuse. Others come to create false memories of abuse and then spend a lifetime coping with anguish as a result of abuse that they never actually suffered. Some even turn to suicide.

Fortunately, the Sixth Amendment provides a procedural guarantee that guards against convictions based on such unreliable evidence: the accused's right to confront the witnesses against him. As interpreted by this Court in *Crawford v. Washington*, 541 U.S. 346 (2004), that right prohibits the civil-law mode of criminal procedure that Ohio would like to employ in the child abuse context. Ohio cannot rely on its teachers as Queen Mary relied on her justices of the peace to elicit statements and produce reports for use in criminal trials—at least not without affording the accused the opportunity to engage in in-court cross examination of his accusers or an acceptable substitute. And under the broader contextual analysis called for by *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), teacher-elicited statements from young children are simply too unreliable to be treated as categorically immune from the confrontation right.

Petitioner's preferred mode of criminal procedure, if endorsed by this Court, would have significant consequences for civil proceedings as well. If unreliable teacher-elicited statements can form the basis for a criminal conviction, there will be less incentive to

conduct thorough investigations into suspected abuse, and it will become even more difficult than it already is for parents accused of abusing their children to exclude or impugn unreliable hearsay statements in divorce, child custody, and visitation proceedings. And protective services agencies, including those already notorious for relying on scant evidence in summary adjudications, will likely separate more children from their parents based on unreliable evidence.

In short, Ohio's proposed rule would harm children and their families. As implemented here, it is also unconstitutional.

ARGUMENT

I. STATEMENTS TO MANDATORY REPORTERS WHO ARE INVESTIGATING ABUSE ARE TESTIMONIAL.

A. The Confrontation Clause protects a core value of American criminal procedure: to obtain a conviction, the state must present its witnesses for cross-examination. The state cannot gather witness statements *ex parte* and introduce those statements through surrogates at trial. That "civil-law mode of criminal procedure" is the "principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50.

If the police had elicited the statements on which Clark's conviction was based, there is no doubt that the evidence would be deemed "testimonial" and thus subject to confrontation. As in *Hammon v. Indiana* (consolidated with *Davis v. Washington*, 547 U.S. 813 (2006)), L.P. was questioned as "part of an investigation into possibly criminal past conduct," and there "was no immediate threat" or emergency. 547 U.S. at

829-30. Once the questioners' suspicions of abuse were confirmed, they made an official report. *See, e.g.*, JA64-66. L.P. did not testify at the ensuing trial, but his statements were introduced through those who elicited them, leading to Clark's conviction. *Crawford* and *Hammon* both held that the Sixth Amendment was violated by the introduction of similar statements to the police.

Yet the police are not the only officials who can elicit testimonial statements. Indeed, the paradigm cases leading to the adoption of the Confrontation Clause did not involve the police at all, because the professional police force did not exist. *Crawford*, 541 U.S. at 53 (noting that "England did not have a professional police force until the 19th century"). The infamous Marian bail and committal statutes directed justices of the peace—respected local officials who performed a variety of functions within the community—to "examine suspects and witnesses in felony cases," and a justice's account of an examination would often be introduced at trial. *Id.* at 44.

Police-elicited statements are deemed testimonial by analogy to these historical abuses: police perform "investigative functions" on the government's behalf and therefore present the "same risk" that the Marian justices of the peace did in the production of testimonial evidence. *Crawford*, 541 U.S. at 53; *see also id.* at 68 (holding that the term "testimonial" applies "at a minimum" to the "modern practices with closest kinship to the abuses at which the Confrontation Clause was directed"). Nothing in *Crawford* or its progeny restricts this reasoning by analogy to police alone.

B. None of this Court's post-*Crawford* cases has considered "whether and when statements made to someone other than law enforcement personnel are

'testimonial.'" *Davis*, 547 U.S. at 821 n.2. There is no need in this case to explore the outer limits of that question, however. For almost fifty years the Ohio mandatory reporter statute has channeled the investigation of criminal child abuse through teachers as a principal category of child abuse reporters and directed them to generate reports for use at trial. *See* 131 Ohio Sess. Laws 632-33 (1965) (Am. H.B. 218) (amending 2151.421 to require a "school teacher acting in his official capacity" to immediately report child abuse "to a municipal or county peace officer"). Teachers, much like the Marian justices of the peace, are respected members of the community, and they are in a position to elicit information from children. The State of Ohio has therefore decided to enlist teachers' help in gathering evidence of criminal child abuse. In this respect, teacher-elicited statements present the "same risk" of the civil-law mode of criminal procedure as did statements elicited by Marian justices of the peace. *Crawford*, 541 U.S. at 53.

The current Ohio mandatory reporter statute serves a number of purposes, but several of its key features reflect the legislature's intent to rely on mandatory reporters to participate in the "identification and/or prosecution of the perpetrator." *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861, 865 (Ohio 2004); *see also Gersper v. Ashtabula Cnty. Children Servs. Bd.*, 570 N.E.2d 1120, 1123 (Ohio 1991) (explaining that the legislature intended "to encourage those who know or suspect that a child has fallen victim to abuse or neglect to report the incident to the proper authorities and/or *participate in the judicial proceedings* to secure the child's safety without fear of being exposed to civil or criminal liability." (emphasis added)). The key features include the following:

- The receiving agency or officer may request a written report specifying, among other things, any "information that might be helpful in establishing the cause of the injury, abuse, or neglect." Ohio Rev. Code § 2151.421(C)(3).
- A report triggers an immediate investigation into the "circumstances," "cause," and "person or persons responsible" for the abuse, conducted "in cooperation with the law enforcement agency," and culminating in a written report "to the law enforcement agency." *Id.* § 2151.421(F)(1).
- The statute requires a "memorandum of understanding" setting forth plans for coordinating the investigative efforts of law enforcement, prosecutors, and relevant public services agencies. *Id.* § 2151.421(J).
- The agency investigating abuse is directed to make "recommendations to the county prosecuting attorney." *Id.* § 2151.421(F)(2).
- The statute explicitly contemplates that criminal "charges" may "aris[e] from the report" by the mandatory reporter and that the accused might seek "suppression of any evidence obtained as a result of the report." *Id.* § 2151.421(F)(1).
- The mandatory reporter's "report is admissible in evidence" in a criminal proceeding and "is subject to discovery in accordance with the Rules of Criminal Procedure." *Id.* § 2151.421(H)(1).
- The statute includes a waiver of certain privileges, *id.* § 2151.421(A)(3), (A)(4)(c), including an express bar on using the physician-patient privilege to "exclud[e] evidence in any judicial proceeding resulting from a report." *Id.* § 2151.421(G)(1)(b).

Together, these provisions reflect an intent to rely on mandatory reporters to generate evidence for use at the criminal trial of the person thought to be responsible.

The ties between the mandatory reporters and law enforcement were clear from the earliest versions of the statute, before the expansion of state agencies designed to protect children and thus before the expansion of constituencies involved in the mandatory reporting process. For example, when teachers were first added as mandatory reporters in 1965, they were required to report directly to the police, both orally and in a written report. *See* 131 Ohio Sess. Laws 632 (1965) (Am. H.B. 218). Although subsequent investigations would be made in cooperation with the applicable child welfare agency, law enforcement had "primary responsibility for such investigations," and the agency would "make such recommendations to the county prosecutor or city attorney as it deem[ed] necessary to protect such children as [were] brought to its attention." *Id.* at 632-33.

The reliance on mandatory reporters to produce evidence for use at trial is not unique to Ohio. The early mandatory reporting laws from the 1960s generally contemplated reporter participation at trial, relaxing "legal prohibitions against their testifying in court." Monrad Paulsen et al., *Child Abuse Reporting Laws—Some Legislative History*, 34 Geo. Wash. L. Rev. 482, 483 (1966). Prosecutors were deeply involved in efforts to pass mandatory reporting laws, *see id.* at 492 & n.40, and in some states reports were to be given directly to prosecutors. *See id.* at 495; Barbara Daly, *Willful Child Abuse and State Reporting Statutes*, 23 U. Miami L. Rev. 283, 322-23 (1969) (noting that five states provided for reports "*solely* to the county or district attorney," and several others

required copies to be forwarded to prosecutors and/or law enforcement). Wyoming's statute, for example, had a "purpose clause [that] include[d] the imposition of criminal responsibility upon any person who contributes to the injury of children." Alan Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 Fam. L.Q. 245, 249 (1974). And although many commentators at the time preferred non-punitive responses to mandatory reports, *see id.*, it was nonetheless apparent that cooperation with law enforcement would "result in a certain amount of prosecution no matter who receives the report." Daly, *supra*, at 325; *see also* Allan H. McCoid, *The Battered Child and Other Assaults Upon the Family: Part One*, 50 Minn. L. Rev. 1, 41 (1965) (noting the understanding that "criminal prosecution was likely to be the result of the report").

In short, mandatory reporting schemes like Ohio's rely on teachers to generate evidence for use at trial. Often, as in this case, the report is made on the basis of *ex parte* statements elicited from the child, and the child's account is introduced at trial through the reporter's testimony or written report without affording the accused any opportunity to explore the basis for the child's statements through in-court cross examination or an acceptable substitute. As implemented in this case, Ohio's mandatory reporting regime bears a "close[] kinship to the abuses at which the Confrontation Clause was directed," and L.P.'s statements should therefore be treated as testimonial under *Crawford*. 541 U.S. at 68; *see also Bryant*, 131 S. Ct. at 1155 (describing the purpose of the Confrontation Clause); *cf.* Brief for the United States at 46 n.18, *White v. Illinois*, 502 U.S. 346, 1991 U.S. S. Ct. Briefs LEXIS 397 (filed July 31, 1991) (No. 90-6113) (arguing that pediatrician's questioning of a child abuse

victim "may be regarded as functionally equivalent to other forms of official interrogation that result in statements by a 'witness'").

C. In recent cases that have tested the outer limits of "testimonial" evidence, this Court has looked to a broader range of circumstances to determine whether the right to confrontation has been triggered. *See generally Bryant*, 131 S. Ct. at 1155; *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012) (plurality opinion) (looking to "all of the surrounding circumstances"). Three relevant circumstances have carried particular force, and—although no deeper contextual analysis is required in this case—all three confirm that L.P.'s statements here are properly treated as testimonial.

Purpose. The Confrontation Clause requires an objective consideration of "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Bryant*, 131 S. Ct. at 1156. The circumstances here reveal that the teachers' purpose was to investigate the potentially criminal conduct that led to L.P.'s injuries—and the person responsible. Ms. Whitley's first question was "What happened?", rather than "What is happening?", thus reflecting an inquiry into past conduct rather than any immediate threat. JA27; *see Davis*, 547 U.S. at 830. Ms. Whitley promptly involved a co-teacher, Debra Jones. JA27-28, 57. Like Ms. Whitley, Ms. Jones sought information on the cause of L.P.'s injuries: "Who did this?" (thus assuming both that there was a "who" and that the "who" had inflicted an injury) and "What happened to you?", JA59. Once L.P. appeared to have implicated "Dee," Ms. Jones took him to the supervisor, Ms. Cooper, who directed Ms. Whitley to make the mandatory report, JA64-65. And from L.P.'s perspective, the

teachers asking him questions were the primary authority figures he encountered outside the home with the power to punish him and others; the questions were serious and incorporated assumptions about the likeliest cause of the injuries; the pressure to identify a person responsible for his injuries was significant; and he ultimately accused "Dee" of wrongful behavior.

Formality. The circumstances of the teachers' questioning of L.P. were sufficiently "formal" within the meaning of *Crawford* and *Davis*. L.P. was separated from the classroom, brought to a supervisor, and asked pointed questions aimed at eliciting statements regarding potential criminal conduct. The questioners understandably took the investigation quite seriously, since knowingly making a false report of child abuse is itself a criminal offense, *see* Ohio Rev. Code § 2151.421(H)(3), as is knowingly causing another person to do so, *see id. Cf. Davis*, 547 U.S. at 830 n.5 ("It imports sufficient formality, in our view, that lies to such officers are criminal offenses."). At the same time, failing to report abuse could expose the teachers to liability as well. Ohio Rev. Code § 2151.421(M).

Reliability. Finally, this Court has looked to whether the circumstances suggest that "the prospect of fabrication" is "significantly diminished" and thus that there is no need to subject the statements to "the crucible of cross-examination." *Bryant*, 131 S. Ct. at 1155 (citing *Davis*, 547 U.S. at 822)). In light of *Bryant*'s holding, it is now clear that "reliability is a salient characteristic of a statement that falls outside the reach of the Confrontation Clause." *Williams*, 132 S. Ct. at 2243. A statement, such as an excited utterance, that is thought to be categorically and intrinsi-

cally reliable is more likely to be non-testimonial. *Bryant*, 131 S. Ct. at 1157 n.9.

The statements elicited by L.P.'s teachers do not fall within any traditional hearsay exception. Indeed, the Court relied on an analogous historical case *excluding* a child's out-of-court account of sexual abuse (to the victim's mother) to distinguish the facts in *Davis*, which involved statements during an ongoing emergency akin to an excited utterance. 547 U.S. at 828 (citing *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779)); *see also Bryant*, 131 S. Ct. at 1157 (noting parallels between *Davis* and the excited utterance exception).

To admit the *ex parte* statements elicited by a teacher from a young child would be particularly perverse because such statements are in fact notoriously *unreliable*. Young children are susceptible to suggestion, which is enhanced when the suggestive questioning is conducted by persons in authority. Young children are also routinely misunderstood, and often unable to provide an accurate account of past events once they have been improperly interviewed by an untrained questioner. *See generally infra* Part II. Under *Bryant*, the fact that young children's statements are so likely to be unreliable militates strongly in favor of requiring confrontation, whether through in-court cross-examination or a constitutionally acceptable substitute.

II. CHILDREN'S STATEMENTS TO TEACHERS ABOUT ABUSE ARE OFTEN HIGHLY UNRELIABLE.

Ohio channels its initial investigations of criminal child abuse through mandatory reporters, such as L.P.'s teachers, whose reports then trigger a series of responses by Ohio's child protection agencies and

services, working in cooperation with police and prosecutors. An express and laudable goal of Ohio's regime is the "elimination of all unnecessary interviews of children who are the subject of [mandatory reporters'] reports," and "when feasible, providing for only one interview of a child." Ohio Rev. Code § 2151.421(J)(2). When the system works as intended, police never interview a child victim at all—only the mandatory reporters themselves or child protection officials do so. And, on the state's view here, that would mean that statements elicited from children introduced to prove criminal child abuse would rarely (if ever) be subject to the accused's confrontation right. *See, e.g.*, Pet'r's Br. at 50-51 (arguing that statements are not testimonial when elicited by those who "have a purpose to protect the children" rather than to gather evidence "to ensure a criminal conviction"). Trial by *ex parte* testimony would be the norm.

But the concerns about the "reliability of evidence" that motivate the confrontation right are at their apex in child abuse cases. *Crawford*, 541 U.S. at 61. Children are notoriously "vulnerable to suggestion," *Maryland v. Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting), and given their unique role as caretakers and authority figures, teachers are particularly unsuited to obtain reliable statements when interviewing young children.

A. Children Are Susceptible To Suggestion.

Children, and young children in particular, are highly susceptible to suggestion. *See* John E. B. Myers, *Children in Court, in Child Welfare Law and Practice* 641, 641-42 (Donald N. Duquette & Ann M. Haralambie eds., 2010) (noting that age is single most reliable factor in predicting a child's suggestibility). This is true in "virtually all events and eyewit-

ness contexts." *Id.* at 642; *see also Kennedy v. Louisiana*, 554 U.S. 407, 443 (2008) ("Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement."). Whenever a young child is asked to give an account of past events, there is always a risk that the statements elicited will reflect the questioner's suggestion rather than the child's memory or experience. This problem of suggestion results from a combination of physiological and developmental factors, and it is exacerbated by common questioning techniques often employed by untrained laypersons, such as teachers, as further explained below.

Physiology. The problem of suggestion is so pronounced in interviews of young children in large part because their brains are not fully developed. In particular, the prefrontal cortex does not mature until young adulthood. Debra A. Poole & Michael E. Lamb, *Investigative Interviews of Children: A Guide for Helping Professionals* 36 (1998). As a result, young children are less capable of both storing memory and accurately recounting the memories they do store. *Id.* The immaturity of the prefrontal cortex also causes "source-monitoring errors"—young children have great difficulty identifying the source of knowledge, specifically whether it came from their own experience or not. *Id.* at 43-44. Thus, a young child may not be aware that "knowledge" about abuse was actually gained from an interview by an adult.

Mental Development. Young children also have small vocabularies, which makes it more difficult both to express themselves and to understand what is being expressed to them. This is compounded by the fact that children are less likely than adults to inform interviewers that they are confused or do not under-

stand a question. Thomas D. Lyon, *Investigative Interviewing of the Child, in Child Welfare Law and Practice* 87, 91 (Donald N. Duquette & Ann M. Haralambie eds., 2010). Furthermore, "very young children are not even aware of their own incomprehension." *Id.* And partly due to their limited vocabularies, children's statements are easily and often misconstrued. Stephen J. Ceci & Maggie Bruck, *Jeopardy in the Courtroom* 258 (2009). Moreover, young children can misinterpret intentions of others, so that innocent "good touches" may be readily confused by children with "bad touches." Poole & Lamb, *supra*, at 16, 19-20.

Technique. Children's susceptibility to suggestion makes it very difficult to obtain valuable information from them. It is possible to avoid suggestion, but doing so "requires careful investigative procedures, as well as a realistic awareness of [children's] capacities and tendencies." Michael E. Lamb et al., *A Structured Forensic Interview Protocol Improves the Quality and Informativeness of Investigative Interviews with Children*, 31 Child Abuse & Negl. 1201, 1203 (2007). The ability to elicit reliable statements takes training, and even well-trained interviewers sometimes mistakenly fall back on improper techniques. Poole & Lamb, *supra*, at 99.

Classroom teachers do not, as a general rule, receive specific training in forensic interviewing of children. Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 59 (2000) ("[T]he fact that the first contact giving rise to a suspicion of abuse is most often with parents or teachers, not with official investigators, is cause for concern rather than for comfort. Official investigators may be trained to avoid suggestiveness; most parents and

teachers are not."); Poole & Lamb, *supra*, at 106-12 (discussing the training required for forensic interviewers opposed to clinical interviewers).

Untrained interviewers (such as L.P.'s teachers) often unwittingly resort to many of the strongest forms of suggestion, which have been shown to lead children to make false statements. For example, instead of using open-ended prompts that invite a narrative response (such as "tell me the reason you came to talk to me"), Lamb et al., *supra*, at 1203, interviewers turn to closed-ended prompts that suggest a limited range of acceptable answers, *id.* at 1203-04, and interviewers engage in repetition of questions and selective reinforcement. Ceci & Friedman, *supra*, at 53-54. When children are "exposed to these forms of suggestion the error rates can be very high, sometimes exceeding 50%." *Id.*

These common but improper interview techniques can have terrible consequences. For example, in the height of the 1980s day-care hysteria, forty people in Bakersfield, California alone were convicted of ritualistic child abuse at day care centers based on the testimony of children. John Johnson, *Testimony in Child Abuse Case Recanted*, L.A. Times, Jan. 13, 2004, http://articles.latimes.com/2004/jan/13/local/me-stoll13. Investigators later discovered that improper interviewing techniques were used on most of the alleged victims, and many of the alleged victims recanted their statements as adults. *See id.*; *see also Craig*, 497 U.S. at 868-69 (Scalia, J., dissenting) (describing "well-intentioned" but improper techniques that led to false convictions of child abuse of many innocent people in Jordan, Minnesota).

The Humpty-Dumpty Effect. The effects of improper suggestion can be irreversible. Once a child's account is tainted by improper interviewing techniques,

it is often impossible to uncover the child's original account. Poole & Lamb, *supra*, at 15. This is known as the "Humpty-Dumpty effect." *Id.* Worse, it is often difficult to discern that a child's account has been tainted by prior improper questioning. *See* Lyon, *supra*, at 87. The Humpty Dumpty effect thus puts a premium on proper questioning in the first instance. Admitting statements elicited by teachers in the lead up to a Hotline call will have the perverse effect of discouraging proper interviewing at facilities better designed to obtain accurate information from children.

B. Teachers Face Special Challenges In Eliciting Statements About Abuse From Children.

Ohio seeks to channel investigations of criminal child abuse through teachers while simultaneously immunizing the statements teachers elicit from the Sixth Amendment confrontation right. But not only are teachers generally untrained as forensic interviewers, but their role as educators makes them especially unsuited to elicit accurate accounts of child abuse from young children. The special challenges teachers face can be traced to three primary causes.

The Authority Figure Problem. Even with the best of intentions, teachers sometimes struggle to avoid suggestion when questioning children about abuse. Children view teachers as authority figures. As a general rule, a child is more susceptible to improper influence when interviewed by an authority figure. *See* Myers, *supra*, at 643. Children are trained, from the first day of school, to give deference to teachers' assertions and avoid being contradictory.

Particularly troubling for the problem of suggestion, children are taught to give teachers the "right"

answer, *i.e.*, the answer a child thinks the teacher wants. Lyon, *supra*, at 94-95. When a teacher is investigating a suspicion of abuse—as Jones put it to L.P., "who did this?"—the perceived "right" answer means an accusation of abuse. The fact that L.P. later gave different answers to the same question (*i.e.*, to the question "What happened?") adds to the probability that suggestion pressured him to give an answer that would satisfy the teacher, even if untrue. Children often struggle to "stand their ground" in the face of suggestive questions. Myers, *supra*, at 643. This is especially true of young children, who are "less able than older children to withstand the social demands of the interview." *Id.*

The Role Model Problem. Teachers are not just authority figures; they are role models as well. Children typically have a strong desire to please the role models in their lives. Such "an important and influential person to [a] child" actually creates "more false positive statements than questioning by an investigator whom the child does not know." Ceci & Friedman, *supra*, at 59.

Relatedly, children often feel shy about expressing their incomprehension to those they look up to. Though many teachers encourage their students to speak up when confused in class, few children actually do so. Especially in the context of the teacher-student relationship, "[c]hildren do not usually volunteer that they do not understand something, and they often give an answer regardless of whether they actually know what they were asked." Ann M. Haralambie & Lauren Adams, *Interviewing and Counseling Legal Clients Who Are Children, in Child Welfare Law and Practice* 111, 116 (Donald N. Duquette & Ann M. Haralambie eds., 2010). This natural tendency is innocuous enough in many con-

texts, but not where the child's statements can lead to serious criminal charges. All the worse if the statements are categorically immune from the confrontation right, as petitioner proposes.

The Training Problem. Even if teachers could overcome the problems associated with their dual roles as authority figures and role models, they might still struggle to elicit reliable statements from their young students because of a lack of effective training. Most teachers simply are not "trained to avoid suggestiveness." Ceci & Friedman, *supra*, at 59. And even with training, some experts believe that certain individuals, such as teachers, who spend significant amounts of time with children, may "think 'I'm good with kids, and so I can wing this.'" Lyon, *supra*, at 95. Such thinking leads to suggestive interviews and tainted statements from children. *Id.*

C. The Questioning Of L.P. Is A Case Study In What Not To Do.

The questioning in this case bears the hallmarks of an improper interview, conducted by teachers who were untrained in proper interviewing and poorly situated to elicit reliable statements.

Repeated and Closed-Ended Questions. When Ramona Whitley first saw the apparent injuries to L.P.'s face, she asked him, "What happened?" JA27. L.P answered that he had fallen and hurt his face. Whitley ignored L.P.'s answer and again asked how he hurt his face. Again L.P. responded that he fell. Whitley and L.P then moved from the lunchroom to the classroom. In the classroom, Whitley again asked L.P., "What happened?" Whitley's repetition of the same questions over and over would naturally signal her bias toward a particular answer (abuse) and her

dissatisfaction with the answer L.P. had first provided. *See* Ceci & Bruck, *supra*, at 78-79.

Whitley then asked Debra Jones to take a look at L.P., and she repeated the same question—"what happened?"—and added another, even more suggestive one: "Who did this?" JA59. This question assumed there was a "who" and that "this", L.P's marks, had been caused by a specific person that L.P. knew. A "bewildered" L.P. at last changed his story and gave the kind of answer his teachers seemed to expect, by giving the name of a person he knew and labeling that person as the culprit. But L.P. remained bewildered and reticent, JA64, 82, and Jones was not sure if he understood the questions he was being asked, JA81-82. As a result, Jones felt the need "to say a few things" while trying "not to put words in his mouth." JA82. *See* Lyon, *supra*, at 89 ("The more the interviewer talks, the more the interview is about the interviewers' suppositions rather than the child's memory.").

The Problematic Setting. The teachers' improper questioning techniques were exacerbated by the setting. The questioning was initiated by the co-teacher (Whitley) in a lunch room, but Whitley soon involved the lead teacher (Jones), who took L.P. from the classroom to the teachers' supervisor, Ms. Cooper. During the course of the questioning, therefore, L.P. was moved from an informal setting to increasingly formal settings, and he faced additional adults who had increasing degrees of authority. All of this would increase the risk of improper suggestion in an interview of a young child. *See* Sarah O'Neill & Rachel Zajac, *Preparing Children for Cross-Examination*, 19 Psych. Pub. Pol. & L. 307, 315 (2013) ("[F]actors that influence children's responding include but are not limited to the perceived credibility and au-

thority of the interviewer; children's desire to please adults; and the formality of the setting." (citations omitted)); Ceci & Bruck, *supra*, at 155 (explaining that additional adults tilt the odds toward false disclosures).

None of this is to suggest that teachers can never elicit the truth—or even that L.P.'s statements were necessarily false. The statements were not reliable, however.

III. IMMUNIZING STATEMENTS TO MANDATORY REPORTERS FROM CONFRONTATION WILL DESTROY FAMILIES AND HARM CHILDREN.

If the Court were to adopt Ohio's proposed position in this case, *amici* are concerned that Ohio and other states would redouble their reliance on mandatory reporters to elicit and report on children's accounts of alleged abuse, to the potential exclusion of more reliable sources of information and sources that are better able to elicit more reliable information from children. Under such a regime, children's statements to teachers would be admissible without regard to the Confrontation Clause.

The same would not be true, however, of statements made to police personnel or consultants working with police who are fully trained in techniques designed both to elicit reliable answers from children and to avoid the "Humpty Dumpty" effect. Because statements to such trained investigators would *not* be immune from confrontation, they are less likely to be sought in the first place: relying on police or specialists working in conjunction with them to elicit statements from children would make it more difficult to secure convictions, as the Sixth Amendment confrontation right would too often get in the way.

When a Hotline call is made by any child abuse reporter, whether a mandatory reporter or a voluntary child abuse report, that should be the starting point, not the end point, of a criminal or child protection investigation. If this Court were to hold that statements of young children to mandatory reporters are not subject to the confrontation right, however, *amici* fear that the Hotline call might become the end point of the investigation in many cases, given that a child's statements may provide the strongest case for the prosecutor, and further inquiry through more accurate interviewing methods could lead the criminal case to unravel.

The predictable result of Ohio's proposed position in this case would be an increase in the number of convictions of child abuse based on faulty and unreliable statements made to teachers who do not have the benefit of training in child interview techniques. In other words, the predictable result would be the result that the Confrontation Clause is specifically designed to avoid: false convictions.

But that is not all. Because this question arises in the context of child abuse accusations, the harms from the regime advocated by the state would extend far beyond the wrongly imprisoned defendant himself, to the children at issue as well as their families. Children who provide statements in response to suggestive questioning can face life-long torment over what they have done. Moreover, immunizing statements elicited by teachers would have significant collateral effects on civil proceedings. State child protective agencies often use "summary" proceedings in which the protections afforded to children and families are already limited. Any further reduction in the reliability of such proceedings—as would accompany a push in the direction of abbreviated investigation of

abuse—will exacerbate the harms to children and families.

A. False Convictions Cause Profound Psychological Harm To Children.

Allowing criminal conviction and imprisonment based on improperly elicited statements from a child is harmful enough. But the harms do not stop there.

Children who come to realize (or who always knew) that their statements were false may spend their lives tormented by guilt. *See, e.g.*, Maggie Jones, *Who Was Abused?*, N.Y. Times Magazine, Sept. 19, 2004, http://www.nytimes.com/2004/09/19/magazine/19KIDSL.html?pagewanted=print&position=&_r=0. For some, the guilt is too much to bear: Carla Jo Modhal, for example, attempted suicide seventeen times after falsely testifying (after being subjected to improper interviewing techniques) that her father had abused her. *See* Kimberley Sevcik, *Mean Justice's Dirty Secrets*, Rolling Stone (2005), *available at* http://truthinjustice.org/ed-jagels.htm; *see also* Mark Arax, *'After 15 Years I Finally Had Gotten Justice'*, L.A. Times, May 27, 1999, http://articles.latimes.com/1999/may/27/news/mn-41527. Rachael Clearly Patton also repeatedly attempted suicide, and was repeatedly committed to mental institutions, after having falsely claimed that her father raped her when she was six years old. David Ashenfelter, *'I'm Missing 16 Years of My Life: Prison Nightmare Ends After Daughter Recants Tale of Rape*, Detroit Free Press, Sept. 13, 2005, at A1. The details of Rachael's false account came from suggestive questions her mother had asked her. *Id.*

The psychological harms associated with having been led to falsely identify an abuser can surface in other ways as well. For example, Edward Sampley

was one of six boys who testified that they had been abused by a man named John Stoll, the father of one of Sampley's friends. *See* Jones, *supra*; Johnson, *supra*. During an investigation of Stoll, Sampley was interviewed numerous times and asked many suggestive questions, which ultimately caused him to falsely tell investigators that Stoll had abused him. Stoll was later convicted and sentenced to forty years in prison. Sampley today fears interacting with and even being in the presence of children—including his own daughter—because he "knows first hand that children do lie" and what can happen if they do. Jones, *supra*.

Other children who provide false accounts of abuse suffer a different form of enduring torment: they grow up falsely believing their own stories of abuse. *See id.* The initial false account becomes reinforced by families and therapists, and the children are thus forced to struggle with coming to terms with often heinous stories of abuse that have no basis in reality.

B. Immunizing Unreliable Statements From Confrontation Could Have Collateral Effects In Civil Proceedings.

If this Court were to endorse the introduction of children's accounts of abuse through teachers as surrogates in a criminal trial, the troubling consequences may bleed over to civil proceedings as well.

First of all, many courts have looked to the Confrontation Clause to determine what protections to afford litigants in civil proceedings. *See, e.g.*, *In re Hunter*, 982 N.E.2d 953, 960 (Ill. App. Ct. 2013) (holding that "*Crawford* applies to proceedings under" Illinois's Sexually Dangerous Persons Act); *In re C.B.*, 574 So. 2d 1369, 1374 (Miss. 1990) ("This is not a criminal case, but we are of the opinion that the

right of confrontation should be accorded to an accused parent in such cases as this."); *Rivera v. Marcus*, 696 F.2d 1016, 1028 (2d Cir. 1982) (holding that, as a matter of due process, foster parents must be afforded the right to confront adverse witnesses in proceedings to remove children from foster care).

There is also a risk that immunizing statements to mandatory reporters from confrontation will also limit the breadth of investigations into abuse in both civil and criminal contexts. After all, if a teacher can act as an effective surrogate for the statements he or she elicits from a young child at trial, then the need to present and thus to investigate corroborating evidence is significantly diminished. The investigation can largely end where it began, with a teacher's suggestive questioning of the young child. Such a result poses a significant threat to families in civil litigation. The effects may be felt in divorce, child custody, and visitation proceedings where courts determine who will be the custodial parent and whether, when, and how often children will have contact with the non-custodial parent.

And the effects may be felt most strongly in the context of proceedings before child protective agencies. Many states have child protection agencies that can restrict parental rights in summary administrative proceedings based on an "indication" (rather than a finding based on the full weight of the evidence) of abuse. *See generally* Susan Badeau et al., *A Child's Journey Through the Child Welfare System*, *in Child Welfare Law and Practice* 341 (Donald N. Duquette & Ann M. Haralambie eds., 2010) (describing the child welfare system); *see also Dupuy v. Samuels*, 397 F.3d 493, 499, 504-06 (7th Cir. 2005) (criticizing the "credible evidence" standard) (citing *Valmonte v. Bane*, 18 F.3d 992, 1002-03 (2d Cir. 1994)). Channeling more

interviews of children to untrained interlocutors—as the vast majority of teachers are—will mean introducing less reliable statements into the mix of such summary proceedings. The proceedings will thus produce even less reliable outcomes than already results from their procedural limitations.

It is no secret that children and families already face severe harms due to the high rate of error in such summary proceedings. In Illinois, for example, those who do challenge child protection agency rulings were once shown to have been exonerated at a "staggering" rate of almost 75%. *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1136 (N.D. Ill. 2001). But all too often, initial indications are not challenged at all, because many caretakers do not know how to begin such a challenge, and lack the wherewithal to pursue it.

This Court has long recognized the importance of protecting the sanctity of the family unit. *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality opinion) (recognizing that "the Constitution protects the sanctity of the family" and family members' decisions to live with one another). Where state action may lead to the termination of parents' relationships with their children, special consideration must be given to both the parents' and children's shared interest in the maintenance of the family. *See Santosky v. Kramer*, 455 U.S. 745, 753, 760 (1982) (holding that "preventing erroneous termination of [parents' and children's] natural relationship" is a crucial consideration in parental termination matters). But endorsing official reliance on statements elicited from young children through suggestive interview techniques puts both children and their families in jeopardy.

The Confrontation Clause does not bar states from mandating that teachers report indications of child abuse to proper authorities. But neither the Confrontation Clause, nor the extensive scientific teaching on the dangers of conducting suggestive interviews of children, supports constructing a constitutional framework through which children's statements to teachers are immunized from confrontation. In the criminal context, the Constitution prescribes the required form of scrutiny: confrontation. *Crawford*, 541 U.S. at 61 (explaining that the Confrontation Clause "ensure[s] reliability of evidence" through the "procedural . guarantee" of confrontation). Holding states to that Sixth Amendment guarantee will lead to deeper and more careful investigations of abuse, enhance the reliability of criminal trials, and simultaneously reduce the collateral effects of false accounts of abuse in the civil context. In short, affirming the decision below will protect children and their families.

CONCLUSION

The judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Ohio

BRIEF OF RICHARD D. FRIEDMAN AND STEPHEN J. CECI AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amicus Richard D. Friedman is the Alene and Allan F. Smith Professor of Law at the University of Michigan Law School. Much of his academic work has dealt with the right of an accused under the Sixth Amendment "to be confronted with the witnesses against him." He has written many articles and essays on that right, and since 2004 he has maintained The Confrontation Blog, www.confrontationright.blogspot.com, to report and comment on developments related to it. He successfully represented the petitioners in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 547 U.S. 813 (2006)), and *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010).

In five previous cases in this Court, he has submitted *amicus* briefs on behalf of himself only, so that he could express his own thoughts, entirely in his own voice. His desire, in accordance with his academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime. In this case,

[1] Each party has filed with the clerk a global consent to the filing of any *amicus* brief on the merits of this case. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* Friedman and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than Friedman. Except as just noted, no persons or entities other than the *amici* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

because elaboration of his views requires a rounding in developmental psychology, he has sought the collaboration of *amicus* Stephen J. Ceci, a renowned leader in the field and one with special expertise on the issues related to this case.

Amicus Ceci is the Helen L. Carr Professor of Developmental Psychology at the College of Human Ecology of Cornell University. Most of his work studies the development of intelligence and memory in preschool-aged children, and he has focused particularly on issues related to the testimony of children. His book JEOPARDY IN THE COURTROOM: THE SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY (1995; with Maggie Bruck) [hereinafter "JEOPARDY IN THE COURTROOM"], won the 2000 William James Book Award of the American Psychological Association (APA). Among the many other awards he has won are lifetime achievement awards from the APA (2003) and the Association for Psychological Science (2005), the APA's E. L. Thorndike Career Achievement Award for substantial career achievements in educational psychology (2014), and the 2013 Distinguished Scientific Contributions to Child Development Award, from the Society for Research in Child Development.

Amici have co-authored an article, *The Child Quasi Witness* [hereinafter *Quasi Witness*], forthcoming in volume 82, issue 1, of the University of Chicago Law Review (2015), that elaborates on the views presented in this brief. A pre-publication draft of this article is available at http://confrontationright.blogspot/2014/10/the-child-quasi-witness.html (posted Oct. 27, 2014).

SUMMARY OF ARGUMENT

Statements made by very young children and offered against an accused pose a particularly difficult conundrum, because of the conjunction of three facts. First, such statements are often highly probative evidence of criminal activity; the criminal justice system is significantly impaired if the trier of fact is not able to learn what the child has said. Second, though such statements may be probative, they are far from certainly accurate; to allow them to be presented to the trier without giving the accused an adequate opportunity to challenge the truthfulness of the child is a denial of fundamental fairness. Third, testimony in open court, subject to cross-examination, is not only often a traumatic ordeal for a very young child but a disastrously poor method for determining the truthfulness of the child.

Amici offer a principled way out of the conundrum. Its key depends on recognition that very young children are not just little versions of adults. They are fundamentally different in ways that call for very different treatment of their statements.

To be a witness within the meaning of the Confrontation Clause requires that the speaker have some understanding of the potential consequences of his statement and the gravity of those consequences. Some very young children lack this capacity. Therefore, their statements should not be deemed to be testimonial for purposes of the Confrontation Clause.

Though the child is not a witness within the meaning of the Confrontation Clause, she may nevertheless be the source of evidence of substantial

probative value. But such evidence is far from conclusive. Accordingly, if the State wishes to present a statement by the child, fundamental fairness requires that, to the extent reasonably possible, he have an opportunity to examine the child. The Constitution does not require that this opportunity be to cross-examine the child through an attorney during trial; indeed, cross-examination is a notoriously poor method for assessing the truthfulness of the testimony of very young children. Rather, the State may accord the accused an opportunity akin to that which the Constitution requires in appropriate cases with respect to physical evidence—to examine the evidence out of court through a qualified expert acting under procedures prescribed by the court. In this context, the expert would have an opportunity to assess and offer an opinion as to the truth-telling capacity of the child and its operation in the particular case.

This procedure not only is proper as a matter of constitutional principle, but it offers important practical advantages. Among others, it avoids the loss of crucial evidence; it minimizes trauma to the child; and it offers the accused a better opportunity for exploring and exposing probative weaknesses of the child's account. It also avoids the undue narrowing of Confrontation Clause jurisprudence that may be created by applying a "one-size-fits-all" approach to the statements of very young children. For similar reasons, this case is a poor vehicle for making general determinations of issues going beyond the realm of statements by children, such as the circumstances in which statements not made to law enforcement officers may be deemed testimonial or the scope of the "primary purpose" test.

ARGUMENT

I. VERY YOUNG CHILDREN LACK THE CAPACITY TO BE WITNESSES WITHIN THE MEANING OF THE CONFRONTATION CLAUSE.

The Sixth Amendment accords the accused "[i]n all prosecutions" the right "to be confronted with the witnesses against him." The essence of the confrontation right is to ensure that witnesses give testimony under the prescribed system (under oath, subject to cross-examination, in the presence of the accused, and, if reasonably possible, in open court), rather than in other ways; absent the right, a State could develop a system by which a prosecution witness could give her testimony, say, by speaking to a police officer in the station-house, *Crawford v. Washington*, 541 U.S. 36 (2004), or in her living room, *Hammon, supra*. The right is categorical; it cannot be defeated by a judicial determination that the particular testimony at issue is reliable. *Crawford*. The right is also limited: It states a principle not applicable to hearsay in general, but rather only to testimonial statements—that is, to statements offered by persons who are acting (whether in or out of court) as witnesses. *Whorton v. Bockting*, 549 U.S. 406, 420 (2007); *Davis, supra*, 547 U.S. at 823-26.

Amici submit that, with respect to statements by very young children, the threshold question is not whether the particular statement is testimonial but whether the child is capable of being a witness at all for purposes of the Confrontation Clause. (As will be explained below, although a negative answer to either of those two questions renders the Clause inapplicable, the consequences are very different. If an adult makes

a non-testimonial statement that (under one of the many exemptions from the rule against hearsay) is admitted for its truth against the accused, the accused may, if he wishes, exercise his Compulsory Process right to make the speaker his own witness. But that is not a viable alternative if a child speaker is not capable of being a witness; an alternative protection for the accused is necessary.)

Because a witness is a person who (whether under constitutionally acceptable conditions or not) gives testimony, a person cannot be a witness within the meaning of the Confrontation Clause if he is incapable of speaking testimonially. This Court has defined testimony in this context as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 1153 (2011), *quoting Crawford*, 541 U.S. at 51 (brackets, internal quotation marks deleted). *Amici* submit that in this context solemnity is best understood to refer not to the manner in which the statement is made—the Confrontation Clause is not rendered inapplicable if the witness speaks jovially—but to an appreciation of the gravity of the declaration. In particular, the speaker must have some understanding of the potential consequences of the declaration and of the significance of those consequences.[2]

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[2] *Bryant* also said that the Confrontation Clause "requires a combined inquiry that accounts for both the declarant and the interrogator," 131 S.Ct. at 1160. The Court also adhered to the principle that "it is the statements, and not the questions, that must be evaluated under the Sixth Amendment," *id.* at 1160-61, n. 11; *see also Davis*, 547 U.S. at 822-23 n.1 ("is in the final analysis the declarant's

In other words, to be capable of being a witness, a person must be able to recognize and understand the truth of the propositions in the following causal chain:

> As a result of my statement, my listeners may believe that what I say happened did in fact happen; as a result of that belief they may take action; and as an ultimate result of that action, the person whose conduct I am describing may suffer serious adverse consequences. Accordingly, my listeners, or others, regard it as important that I speak truthfully.

Recognizing this chain of causation involves comprehending the perceptions, understandings, desires, and reactions of others, including people not part of the immediate conversation. Adults of ordinary intelligence have the capacity to do this. Very young children do not.[3]

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statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate"). We believe the proper resolution is to determine the reasonable expectations of a person in the position of the declarant, taking into account the impact on those expectations that would be created by such a person's understanding of the purpose of the interrogator, if there is an interrogator.

[3] See *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007) (endorsing the statement in Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 251-52 (2002), that "[e]ven statements by very young children may be highly probative[, b]ut very young children are not yet at a stage where they can be expected to take the responsibility of being a witness"). In addition to the cognitive argument presented here, there is a moral argument—which we will not analyze further but which we think deserves serious consideration—that society should

Researchers have amply demonstrated that young children, particularly before first grade, are fundamentally unlike older persons in social cognitions—that is, in the inferences they draw from social encounters. There is a biological basis for this deficit: The prefrontal cortex of the developing brain, which controls so-called "executive functions" such as monitoring, planning, and control of impulses,[4] is not mature until late adolescence.[5] Numerous studies reveal the deficits that result in young children's cognitions as a result of this neural immaturity.[6]

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not impose on young children, perhaps not even until adolescence, the ordeal and responsibility of being witnesses. *See* Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 Neb. L. Rev. 1258, 1280-85 (2003).

[4] Marilyn C. Welsh et al., *A normative-developmental study of executive function*, 7 DEVELOPMENTAL NEUROPSYCH. 131 (1991) [hereinafter "*Executive Function*"]; Hiroki R. Hayama & Michael D. Rugg, *Right dorsolateral prefrontal cortex is engaged during post-retrieval processing of both episodic and semantic information*, 47 NEUROPSYCHOLOGIA 2409 (2009).

[5] *See, e.g.*, Monica Luciana & Charles A. Nelson, *The functional emergence of prefrontally-guided working memory systems in four- to eight-year-old children*, 36 NEUROPSYCHOLOGIA 273 (1998); Dima Amso & B. J. Casey, *Beyond what develops when: neuroimaging may inform how cognition changes with development*, 15 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 24 (2006); John R. Best et al., *Executive functions after age 5: changes and correlates*, 29 DEVELOPMENTAL REV. 180 (2009).

[6] See Stephen J. Ceci, et al., *Representational Constraints on the Development of Memory and Metamemory: A Developmental-Representational-Theory*, 117 PSYCH. REV.

These deficits affect a web of interrelated psychological abilities that are involved in understanding the mental states of others—beliefs, intentions, motives, and desires—as well as the effects that one's own actions and statements have on others.

Most adults can simulate the mental states of other people—put themselves in others' shoes, in the colloquial phrase—so that they can predict others' future behavior and how variations in contexts and external forces will affect that behavior.[7] Doing so requires that the person understand that others have thoughts, feelings, and beliefs that may differ from her own and that may motivate others' behavior. Without this understanding—often referred to as "theory of mind" ("ToM")—people would be unable to make sense of the social world and would be ill-suited for social encounters.[8] The term "social understanding" is sometimes used within the framework of ToM to refer to "the ability to conceptualise mental states such as

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464 (2010).

[7] See Nicholas Epley & David Dunning, *Feeling "Holier Than Thou": Are Self-Serving Assessments Produced by Errors in Self- or Social Prediction?*, 79 J. PERSONALITY & SOC. PSYCHOLOGY 861, 872 (2000); Emily Balcetis & David Dunning, *Considering the Situation: Why People are Better Social Psychologists than Self-Psychologists*, 12 SELF & IDENTITY 1, 2 (2013); Richard E. Nisbett & Ziva Kunda, *Perception of Social Distributions*, 48 J. PERSONALITY & SOC. PSYCHOLOGY 297, 309 (1985).

[8] *See* Sandra Bosacki & Janet Wilde Astington, *Theory of Mind in Preadolescence: Relations between Social Understanding and Social Competence*, 8 SOC. DEVELOPMENT 237, 237 (1999) (finding a positive correlation between ToM skills and social competence).

beliefs, desires, and intentions and to use these constructs to interpret and predict the actions of others."[9] The various aspects of these abilities have different developmental trajectories.[10] But before age four, very few children exhibit even rudimentary forms of ToM; by age six, nearly all normally developing children have acquired these rudiments.[11]

Thus, below the age of four, most children are unaware that other people might have false beliefs.[12] Indeed, below this age, most children do not recognize that the information that is available to them and based on their observations is not known by other people; therefore, the basic concept of *informing* another person, and adding to that other person's state of knowledge, is foreign to them. Even well after they gain this recognition, most children lack the ability that adults have to use readily available information to draw an inference about the mental state of another person.[13] Lacking well-developed executive functions,

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[9] *Id.* at 237–38.

[10] *See id.* at 238; Welsh, et al., *Executive* Function, *supra*, 7 DEVEL. PSYCH. at 138.

[11] *See* Heinz Wimmer & Josef Perner, *Beliefs about Beliefs: Representation and Constraining Function of Wrong Beliefs in Young Children's Understanding of Deception*, 13 COGNITION 103, 104 (1983) [hereinafter "*Beliefs about Beliefs*"].

[12] *See* JEREMY CARPENDALE & CHARLIE LEWIS, HOW CHILDREN DEVELOP SOCIAL UNDERSTANDING 24 (2006).

[13] Numerous experiments demonstrate this. *See, e.g.*, *id.* at 30, *citing* Wimmer & Perner, *supra*, *Beliefs about Beliefs*; Francesca G.E. Happé, *An Advanced Test of Theory of Mind: Understanding of Story Characters' Thoughts and Feelings*

preschool-aged children are unlikely to be capable of the solemnity of recognizing that giving a false account of a past event may cause their listeners and others to take action that will lead to unjustified consequences for another person; these children are likely to say what they believe will please their listeners.[14]

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by Able Autistic, Mentally Handicapped, and Normal Children and Adults, 24 J. AUTISM & DEVELOPMENTAL DISORDERS 129, 137–38 (1994) (describing the differences between adults and children in performance of ToM tasks); T. Aboulafia-Brakha, et al., *Theory of Mind Tasks and Executive Functions: A Systematic Review of Group Studies in Neurology*, 5 J. NEUROPSYCHOLOGY 39, 40 (2011) (discussing studies that "support[ ] the view that [executive function] is necessary for [ToM] development"). These studies suggest that before ages three to six, children have difficulty recognizing that others operate on a base of information different from their own. *See* CARPENDALE & LEWIS, SOCIAL UNDERSTANDING, *supra*, at 53–59.

[14] *See* Amelia Courtney Hritz, *Lie to Me: Compliant False Accusations by Children* (2014), available at http://www.human.cornell.edu/hd/ceci/upload/Hritz_Master_Thesis_20140617.pdf, at 5-6 (indicating that social pressures cause children to make statements consistent with the desire of an interviewer; 15 of 16 young children asked to knowingly make a false accusation complied, and many maintained the false accusation during a later neutral interview, even after being told the first interviewer had made a mistake); Rhona H. Flin, et al., *Children's Knowledge of Court Proceedings*, 80 BRIT. J. PSYCHOLOGY 285, 294 (1989) [hereinafter "*Children;s Knowledge*"] (indicating that of the children studied, few of the eight-year-olds but most of the ten-year-olds thought that honesty in court is important "because of the risks of convicting the innocent or releasing the guilty").

The many experiments that test limitations on young children's ToM are not, of course, set in the forensic context. But they show in strong terms an inability on the part of very young children to appreciate the mental states of other persons and to predict the consequent behavior of those others—and these studies do so with respect to relatively simple matters. These experiments therefore provide strong evidence that a very young child speaking to an adult about an incident in the past will fail to have the sophisticated understanding necessary to recognize that the adult's purpose in conducting the conversation is to gather information that may be used against the person whose conduct the child has described, and that as a result the person may suffer punishment.

This is especially true because the contemplated punishment involves an intricate series of events—well in the future and involving many other people not part of the conversation—that a very young child is not likely to contemplate or understand. Even through age ten, children's very rudimentary comprehension of the legal system is unlikely to include familiarity with the concept of evidence or understanding of why it is needed in court.[15]

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[15] *See* Karen J. Saywitz, *Children's Conceptions of the Legal System: "Court Is a Place to Play Basketball"*, in STEPHEN J. CECI, et al., eds, PERSPECTIVES ON CHILDREN'S TESTIMONY 131, 135 (1989) (reviewing studies that describe children's lack of familiarity with the courtroom); Flin, et al., *Children's Knowledge, supra*, 80 BRIT. J. PSYCHOLOGY at 291, 295 (meaning of "evidence" and "witness," among other terms, not understood at all by six-year-olds studied); Amye Warren-Leubecker, et al., *What Do Children Know about the*

We emphasize that we are not arguing that very young children make *bad* witnesses; as we will emphasize below, they are often sources of good evidence.[16] Rather, we are arguing that very young children, even though capable of describing criminal conduct, should be deemed *outside the category of witnesses altogether*.[17] There is no need in this case to

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Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research, in CECI, et al., eds, PERSPECTIVES 158, 165–67 (18% of three-year-olds in study knew what a courtroom was; few children under eight knew about witnesses).

[16] There is therefore no incompatibility whatsoever between a child being incapable of being a witness for Confrontation Clause purposes and the child's statement being sufficiently good evidence to satisfy a reliability-based hearsay exception.

[17] This view is entirely consonant with the confrontation right as it was understood at the time of the Framing. *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (K.B. 1779), held that even a young child may not *testify* unsworn. *Brasier*, which operated under the assumption that the child's statement in that case should be deemed testimony, did not prevent courts from admitting hearsay statements made by young children, and the courts continued to do so routinely: "*Brasier* clearly does not stand for the proposition that incompetent children's hearsay was inadmissible; indeed, it preserved the opposite proposition, which was that if a child could not testify, his or her hearsay statements could be heard." Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post*-Davis, 82 IND. L.J. 1029, 1031 (2007).

Nor do any decisions of this Court foreclose this view. Decisions from the pre-*Crawford* era—when, though the Confrontation Clause was highly defeasible, its scope

define precisely the bounds of the set of children who should be treated in this way. The set is certainly not an empty one.[18] And we believe it is clear that L.P. should be deemed incapable of being a witness for purposes of Confrontation Clause purposes. He was not yet three-and-a-half at the time of the statements at issue. His "bewildered" manner and appearance when he was questioned, J.A. 59, 61, his incommunicativeness, J.A. 27, 62, and the fact that in rapid succession he gave three inconsistent answers—"I fell," "Dee did it," and "I don't know," J.A. 47—strongly indicate that, as would be expected of a child of his age, he did not understand the situation or the significance of his words. The determination of the trial court that L.P. was incompetent to testify at trial lends force to the conclusion that he was incapable of being a witness for Confrontation Clause purposes.

Contrast Sylvia Crawford, who gave her rendition of a knife fight to the police, or Amy Hammon, who gave the police a description of an assault by her husband, or the lab analysts in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), who certified that a substance about which police had inquired was cocaine. Each of these people understood the solemnity

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included all hearsay by out-of-court declarants, *Ohio v. Roberts*, 448 U.S. 56, 65 (1980)—are inapposite. And this is the first case in this Court since *Crawford* involving the applicability of the Clause to a statement by a child.

[18] Statements of children as young as 18 months old have been offered as proof of abuse. *State v. Webb*, 779 P.2d 1108, 1109 (Utah 1989) (concerning a statement by a child, made to her mother after a bath taken shortly after a visit with her father,"Ow bum daddy").

of the occasion and the potential consequences of her statement. Allowing their statements to be part of the proof against an accused would create a system in which a witness could knowingly testify against an accused without confrontation, in a station-house or a living room or a laboratory. L.P. was not just a littler, less able, version of these adults. He was not capable of being a witness.

II. THE STATEMENTS OF VERY YOUNG CHILDREN MAY BE HIGHLY PROBATIVE EVIDENCE, BUT THEY ARE FAR FROM INFALLIBLE.

In arguing that very young children are incapable of being witnesses for purposes of the Confrontation Clause, we do not contend that their statements cannot be useful evidence. On the contrary, statements of children may be highly probative and crucial to a case. But, like the statements of any observer, they do not constitute conclusive proof of a proposition they assert.

The probative value of evidence with respect to a given proposition depends on the relative magnitude of two probabilities: (1) the probability that the evidence would arise if the proposition were true, and (2) the probability that the evidence would arise if the proposition were false. If those two probabilities are equal, the evidence is worthless. Only if the second probability is zero—that is, it would be impossible for the evidence to arise if the proposition were false—would the evidence be conclusive proof of the proposition.

As a general matter, when a person makes a

statement describing a disputed event, the first probability is much greater than the second, so the evidence has significant probative value with respect to that event. But in most cases the second probability is not trivial; the statement is not conclusive, or nearly conclusive, proof of the event. And these two general propositions are no less true of children.

Ordinarily, to report accurately on an event, an observer must perceive it accurately, retain and recall an accurate memory of the perception, sincerely intend to report the truth about it, and accurately communicate the intended message. Flaws in any of these capacities—perception, memory, sincerity, or communication—can lead any observer to make an inaccurate statement.[19] But these capacities usually operate reasonably well even in young children. Children's perception of events within their understanding is good.[20] Their memory is reasonably good, even over an extended period;[21] despite childhood

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[19] *See* 2 KENNETH S. BROUN, ed., MCCORMICK ON EVIDENCE 178 (2013) (referring to perception, memory, narration, and sincerity).

[20] *See* Alan Slater & Scott P. Johnson, *Visual Sensory and Perceptual Abilities of the Newborn: Beyond the Blooming, Buzzing Confusion*, in FRANCESCA SIMION & GEORGE BUTTERWORTH, eds., THE DEVELOPMENT OF SENSORY, MOTOR AND COGNITIVE CAPACITIES IN EARLY INFANCY: FROM PERCEPTION TO COGNITION 121, 138 (1998); Elizabeth Spelke, *Infants' Intermodal Perception of Events*, 8 COGNITIVE PSYCHOLOGY 553, 554 (1976).

[21] *See* CECI & BRUCK, JEOPARDY IN THE COURTROOM, *supra*, at x, 235. For example, children who went to Disney World when they were 2½ to 4 years old and tested for their memory 18 months later gave highly accurate descriptions

limitations, the memory system functions in at least rudimentary form from birth, and it is well developed long before ToM, which usually does not develop before age four.[22] A child, like an adult, might have a motive that deflects her from a sincere desire to tell the truth. But young children are less likely to have such insincere motives than are older persons and tend to have a less well-developed ability to lie;[23] in any event, like adults, young children are far more likely to intend to communicate a given proposition if it is true than if it is false. And, although their communicative ability is limited as compared to that of adults, young children are usually able to communicate reasonably well important aspects of events that they understand;[24] they are certainly more likely to communicate that a given event happened if it is their intent to do so than if it is not.

Thus, children's statements are often highly probative; rendering them inadmissible may deprive the truth-determining process of information of critical

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of their experiences; see Nancy R. Hamond & Robyn Fivush, *Memories of Mickey Mouse: Young children recount their trip to Disney World*, 6 COGNITIVE DEVELOPMENT 433 (1990).

[22] *See* DAVID F. BJORKLUND, CHILDREN'S THINKING: COGNITIVE DEVELOPMENT AND INDIVIDUAL DIFFERENCES 250–51, 267 (4th ed. 2005).

[23] *See* Michael Lewis, *The Development of Deception*, in MICHAEL LEWIS & CAROLYN SAARNI, eds., LYING AND DECEPTION IN EVERYDAY LIFE 90, 92 (1993).

[24] Hilary Horn Ratner, et al., *Children's Organization of Events and Event Memories*, in ROBYN FIVUSH & JUDITH A. HUDSON, eds., KNOWING AND REMEMBERING IN YOUNG CHILDREN 65, 66 (1990).

value. This is especially true if the child's statement describes an event – such as ejaculation – with which the child is presumably unfamiliar; in such a case one might conclude that, even if the child is not a particularly accurate reporter, it would be unlikely, if the event did not occur, that the child would happen to come up with the description.[25]

But of course children, like adults, are far from infallible. Like adults, they may report inaccurately for any number of reasons. Perhaps most significantly, very young children are often more vulnerable to suggestion than are adults.[26]

When a child's statement is offered against an accused, therefore, the accused has a critical

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[25] *See, e.g.*, Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 YALE L.J. 667, 681-85 (1987) (analyzing a case in which a child presents the description of a stranger's apartment, where she was allegedly molested).

[26] *See generally* Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33 (2000); Stephen J. Ceci, et al., *Suggestibility of Children's Memory: Psycholegal Implications*, 116 J. EXPERIMENTAL PSYCHOLOGY: GENERAL 38 (1987). *See also* CECI & BRUCK, JEOPARDY IN THE COURTROOM, *supra*, at 233. In most forensic contexts, suggestibility tends to diminish with age, because of older children's stronger memory traces, better monitoring ability, and lesser likelihood of incorporating interviewers' suggestions into their accounts. *See* Stephen J. Ceci & Maggie Bruck, *Children's Suggestibility: Characteristics and Mechanisms*, 34 ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR 247 (2006).

interest—as he would with respect to the statement of an adult—in impeaching the statement. The accused may wish to demonstrate that it is far from certain that the child would have made the statement even if the event described in the incident did in fact occur. Usually more saliently, the accused has a critical interest in showing that there is a substantial probability that the child would have made the statement even if the event did *not* occur. That probability may be attributable in part to facts that hold true in general with respect to children of the particular child's age and developmental level. But the probability may also be attributable in significant part to specific facts concerning the particular child, and to even more specific facts concerning the subject matter of the particular statement.

III. THE ACCUSED HAS A CONSTITUTIONAL RIGHT TO EXAMINE A YOUNG CHILD WHOSE STATEMENT IS INTRODUCED AGAINST HIM—BUT NOT BY CROSS-EXAMINATION AT TRIAL.

If an adult's statement is introduced for its truth against an accused, the principal method of impeaching the statement—that is, undercutting the inference that the making of the statement proves the truth of what it asserts—is cross-examination. If the statement is testimonial, the Confrontation Clause ensures that the statement cannot be introduced against the accused unless he has an opportunity for cross-examination. Even if it is not testimonial, the rule against hearsay presumptively excludes the statement if the speaker does not testify live at trial.

And even if the statement fits within an exemption to the hearsay rule, if the speaker is available the accused can exercise his Compulsory Process rights to make her a witness and examine her by leading questions as if on cross-examination; *see, e.g.*, Fed. R. Evid. 611(c). Underlying this system is the basic principle, repeatedly endorsed by this Court, that cross-examination is "the greatest legal engine ever invented for the discovery of truth." 5 WIGMORE ON EVIDENCE § 1367; *see, e.g., Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (plurality opinion); *California v. Green*, 399 U.S. 149, 158 (1970).

In the context of young children, we submit that this cross-examination-based model is neither constitutionally required nor satisfactory. It is not constitutionally required because, as we have argued, young children are not capable of being witnesses for purposes of the Confrontation Clause. And it is not satisfactory because, in the context of young children, it simply ignores reality—and a great deal of empirical research[27]—to act on the basis that cross-examination is a great "engine for the discovery of truth." For several reasons, a system dependent on examination by attorneys in open court—direct as well as cross—is in fact a disastrously poor method for generating and discerning truthful statements by young children.

First, even if the child is deemed competent to be a trial witness, she may not be able to give a coherent rendition of the episode at issue. A combination of

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[27] For a useful review of the research, see Rachel Zajac, et al., *Disorder in the courtroom? Child witnesses under cross-examination.*, 32 DEVELOPMENTAL REV. 181 (2012).

various factors—including the passage of time, the stress caused by the initial event, and the ordeal of the proceeding (even if that ordeal is reduced pursuant to *Maryland v. Craig*,, 497 U.S. 836 (1990))—may make her essentially non-communicative.

Second, a cross-examiner is often unable to secure useful responses to questions from a young child. The syllogistic logic so often central to cross-examination – "You've testified that X is true, but you've also said that Y is true, and they can't both be true, so you must not be telling the truth one time or the other." – is not likely to be useful with young children.[28] When the child essentially fails to answer questions on cross, the trier probably does not assume that the reason is flaws in the child's original account; the far more natural inference is that, while the original account may have been true, the child is simply unable or unwilling to answer the cross-examiner's questions.[29]

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[28] *See, e.g.*, Lucy Berliner & Mary Kay Barbieri, *The testimony of the child victim of sexual assault*, 40 J. OF SOC. ISSUES, 125, 132 (2010). For a sadly representative example of the difficulties defense lawyers often face in trying to gain any traction on cross-examination, see *Commonwealth v. Kirouac*, 542 N.E.2d 270, 272 n.4 (Mass. 1989) (beginning with a negative answer to the question, "[D]o you remember yesterday you talked about some things that happened to you?").

[29] The problem is compounded by the tendency of lawyers to ask questions in ways that children are unlikely to understand. Rachel Zajac & Harlene Hayne, *I Don't Think That's What* Really *Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports*, 9 J. EXP. PSYCH.: APPLIED 187, 187 (2003) [hereinafter "*What* Really *Happened*"] ("cross-examination often includes leading

Third, when cross-examination does succeed in getting the child to change her account, it is as likely to cause a young child to change an accurate statement as to cause her to correct an inaccurate one. The net effect is to diminish accuracy.[30]

Finally, and the determinative factor in this case, the child is often, as here, deemed incompetent to be a witness at the time of trial. In a model based on examination at trial, that leaves two highly unsatisfactory choices. One is to exclude the child's statement, thus depriving the truth-determining process of potentially critical evidence. The other, the

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questions, complex vocabulary, and complex syntax"); Rachel Zajac, et al., *Asked and Answered: Questioning Children in the Courtroom*, 19 PSYCHIATRY, PSYCHOLOGY AND LAW 199 (2003); MARK BRENNAN & ROSLIN E. BRENNAN, STRANGE LANGUAGE: CHILD VICTIMS UNDER CROSS EXAMINATION (1988).

[30] See Zajac and Hayne, *What* Really *Happened*, *supra*, 9 J. EXP. PSYCH.: APPLIED at 187, 191 (2003) (concluding, on the basis of experiment involving 5- and 6-year-olds in which "cross-examination not only proved to be unsuccessful in discrediting inaccurate children (i.e., misled children questioned about false events), it also decreased the accuracy of children who were initially correct," that "cross-examination style questioning is inappropriate for young children"); Rachel Zajac and Harlene Hayne, *The Negative Effect of Cross-Examination Style Questioning on Children's Accuracy: Older Children Are Not Immune*, 20 Applied Cognitive Psychology 3, 4, 11 (2006) (finding that cross-examination reduced accuracy, "to a point where accuracy did not differ significantly from chance" with 5- and 6-year-olds, and significantly even in 9- and 10-year-olds).

resolution adopted by the trial court in this case, is to admit the statement and offer the accused no opportunity whatsoever to examine the source of evidence that might condemn him.

That cannot be a constitutionally acceptable outcome. The essential point is that the child, even though not capable of being a witness at trial, is still a source of crucial prosecution evidence. In evaluating that evidence, the trier of fact must assess, in particular, how probable it is that the evidence would arise if the proposition that it is offered to prove were not true. *See* p. 15 *supra*. And that assessment will depend in turn on assessments of alternative possibilities as to how the child may have come to make the statement. The situation therefore invokes what this Court has called "the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*,458 U. S. 858, 867 (1982).

The situation is essentially the same as if the prosecution presented physical trace evidence to prove its version of an event—say, the markings on a bullet, offered to prove that it was fired by a given gun. The defense would want to demonstrate that (1) it is far from certain that the markings would be produced if the gun did fire that bullet, and, usually of greater significance, (2) it is plausible that the markings would be produced if the gun did not fire the bullet. The basic principle, as articulated in one leading case, is that "[f]undamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to

varying expert opinion." *Barnard v. Henderson*, 514 F.2d 744, 746 (5th Cir. 1975). *Accord, e.g, White v. Maggio*, 556 F.2d 1352 (5th Cir. 1977) (holding that evidence is critical if testimony by a skilled expert after examination "could induce a reasonable doubt in the minds of enough jurors to avoid a conviction"); 6 WAYNE R. LAFAVE, et al., CRIMINAL PROCEDURE § 24.3(a), at 340 (3d ed. 2007) ("Fundamental fairness in an adversarial system requires that the defense be given the tools with which it can obtain existing evidence that challenges the prosecution case, either by tending to establish affirmatively the defendant's innocence or by simply casting doubt upon the persuasiveness of the prosecution's evidence.") *id.*, vol. 5, §20.3(g) n. 120.1 (2013-14 pocket part) ("the right to 'inspect' generally is viewed as encompassing defense access for the purpose of conducting scientific testing where such testing will not interfere with the prosecution's use of the evidence or further prosecution testing"; listing cases).[31]

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[31] For older state cases in the same line, see, e.g., *People v. Backus* (1979) 590 P.2d 837, 851 (Cal. 1979) ("Due process requires that criminal defendants have an opportunity to examine, and in appropriate cases have chemical tests performed on, evidence to be offered against them."); *Ex parte Baker*, 144 So.3d 1285, 1290 (Ala. 2013) (*quoting with approval Warren v. State*, 288 So. 2d 826, 830 (Ala. 1973): due process requires that the defendant "be furnished a sample of the allegedly prohibited substance that will be offered against him in the trial so that he can have its qualities researched by scientists of his choosing").

White, like *Barnard*, was decided on *habeas*. Most often federal courts need not reach the constitutional issue because Fed. R. Crim. P. 16 provides the defendant a right

Similarly, if the prosecution presents the statement of a child to prove its version of an event, that evidence may be critical, as in this case. When it is, the defense will need to demonstrate, as best it can, that (1) it is far from certain that if the events occurred as the prosecution contends, the child would make the statement, and most particularly (2) it is plausible that the child would make the statement even if the event did *not* occur as the prosecution contends. If presenting the child as a trial witness is not feasible or, as in this case, altogether foreclosed, fundamental fairness requires that, if the child is available, the accused have "the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court," examine the child out of court. The expert, a qualified psychologist, might then be able to offer at trial not mere generalities about the vulnerabilities of children but an assessment of the capacities of *the particular* child in making a statement on *the particular* subject, and of whether there are plausible explanations accounting for the child's making of the statement other than that the event occurred as the prosecution contends.[32] In some cases, such evidence

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of access to the evidence in similar situations. And the overall volume of constitutional litigation in this area is limited by the fact that almost all of the states have similar rules that allow the defendant to inspect tangible items that the prosecution will use at trial or that are material to preparation of the defendant's defense. 5 LAFAVE, CRIMINAL PROCEDURE, *supra* § 20.3(g), at 405-06.

[32] For similar reasons, courts hold that in some circumstances of compelling need, the accused has a right, based on due process, to take a psychological, psychiatric, or physical examination of an alleged crime victim, often by an

may indeed "induce a reasonable doubt in the minds of enough jurors to avoid a conviction." *White v. Maggio*,

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expert selected by the defense. *See, e.g., People v. Wheeler*, 602 N.E.2d 826 (1992); *People v. Chard*, 808 P.2d 351, 353, 355 (Col. 1991) ("In deciding whether to grant a defendant's motion for the involuntary psychological examination of a child sexual-abuse victim, the court must weigh the defendant's right to a fair trial against the invasion of the victim's privacy interests. The majority of courts considering the issue of whether a trial court has the power to order a compelled physical examination of a child victim in the absence of statutory authority have sought to balance a defendant's right to discover possible exculpatory evidence against the victim's privacy interests."); *Hamill v. Powers*, 164 P.3d 1083 (Ct. Crim. Apps. Okla. 2007) (collecting cases). With respect to adults, the purpose of such an examination is typically to assess a condition or capacity of the victim bearing on whether a crime was committed—such as whether she suffers from rape trauma syndrome or has the capacity to consent to sexual contact—and *not* to assess the victim's credibility, *Wheeler, supra*, at 831; *State v. Doremus*, 514 N.W.2d 649, 651-52 (Neb. Ct. Apps. 1994), which would ordinarily be left to cross-examination at trial.

With respect to children, however, concerns about veracity are sometimes a significant factor in determining whether the accused should be accorded a psychological examination of the complainant, *e.g., Griego v. State*, 893 P.2d 995, 999-1000 (Nev. 1995)—suggesting that the courts are concerned about the adequacy of trial testimony to provide a basis for assessing the child's credibility. And if the child will not testify live at trial, thus preventing the jury from being "able to assess credibility firsthand," that is a significant factor weighing in favor of ordering the examination. *State v. Osgood*, 667 N.W.2d 687, 693-94 (S.Dak. 2003).

supra.

We have outlined elsewhere the type of guidelines that might be incorporated into a protocol that, under court supervision, would govern the govern the conduct of such an examination. *Quasi Witness*, *supra*, at 13-14. In brief, the interviewer should be qualified by training to conduct the examination; the interviewer should usually be the only person in the room with the child; the interview ought to be video-recorded; the interview should be conducted in a way that minimizes trauma to the child and possible taint of the child's memory; a prosecutor and a defense lawyer ought to be able to observe the interview as it occurs, either through a one-way mirror or by video transmission, and a judicial officer should be available at least by telephone; neither side should be allowed to intervene except with the consent of the other side or approval of the court, and even then only for exigent reasons; and the interviewer should be able to seek consultation outside of the examination room. We do not, of course, claim that these precise guidelines are necessarily optimal for every case; there is no doubt, however, that suitable guidelines can be developed and refined with experience.

We have presented this approach as a matter of principle: Very young children should not be deemed witnesses for purposes of the Confrontation Clause; they nevertheless may be the sources of critical evidence that should not be lost to the fact-finding process; if that evidence is to be admitted, then the accused should, as a matter of fundamental fairness under the Confrontation Clause, have an opportunity to have a qualified expert of his choosing examine the

child out of court and testify at trial about the probative value of the child's statement. We also wish to emphasize that adoption of this approach offers the adjudicative system several practical advantages of great importance.

First, this approach prevents a significant lacuna that arises under the usual practice if, as in this case, the child is not competent to testify at trial or cannot feasibly be made a trial witness: Either her prior statement is excluded, denying the trier of fact potentially valuable information, or as in this case it is admitted but the accused has no opportunity to examine her. Under the approach presented here, the lacuna disappears: The Confrontation Clause would pose no barrier to presentation of secondary proof of the child's statement, and the accused would have a right to examine the child—not through cross-examination by an attorney in open court, but through a pretrial videotaped interview conducted by a qualified forensic interviewer.

Second, the availability of this approach would make it feasible to maintain a rather high threshold for determining when a child is competent to testify at trial. If the child falls below such a threshold, the consequence need be neither a loss of crucial evidence to the prosecution nor a vacuum of rights for the accused; rather, it simply means that the child is treated under a *different* model, for purposes both of presenting her account and of the accused examining her.[33]

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[33] As a related matter, this approach offers a possible solution to the dilemma of whether, in determining if a

Third, the potential trauma for the child, which is very substantial,[34] would be significantly reduced. Even under the procedure tolerated by *Maryland v. Craig* the child must testify formally in response to lawyers' questions in a room with several strangers. Under the procedure advocated here, one person, a qualified interviewer, would be with the child in a private, comfortable room.

Fourth, as compared to cross-examination by an attorney in some form of a courtroom, perhaps with the accused present, an interview by a qualified developmental-forensic child interviewer operating in a comfortable setting, outside the gaze of the defendant, has a much better chance of eliciting information that may raise doubts about the child's

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statement is testimonial, a court should assume that the posited hypothetical reasonable person whose anticipation is assessed is the same age as the speaker. If only children above a given level of development may be considered witnesses, and if that threshold is set rather high, it becomes less odd, in the context of asking whether a particular statement is testimonial, to ask what the expectations of a reasonable adult would be. In other words, it becomes more plausible to treat all children in either of two ways, as ordinary witnesses, judged by the same standards as all adults not severely limited, or as not sufficiently developed to be treated as witnesses at all.

[34] *See, e.g.*, Rhona H. Flin, *Hearing and testing children's evidence*, in GAIL S. GOODMAN & BETTE L. BOTTOMS, eds.,CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 279 (1993); Gail S. Goodman, et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault*, MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT, p. v (1992).

initial account.[35]

Fifth, under the practice prevailing in most states, the accused does not have a right to examine the child – if at all – until the time of trial, which may be very long after the events at issue. Under the approach presented here, examination would occur pre-trial, and usually there would be no reason why it could not occur when events are relatively fresh in the child's mind.

Finally, the approach presented here would prevent distortion of Confrontation Clause jurisprudence that could arise if a "one-size-fits-all" approach is extended to statements by young children. It is often true, as here, both that (1) a young child's statement is highly probative, making exclusion of it an extremely unappealing prospect, and (2) compelling the child to testify live at trial would also be an unappealing result or—as here, given the trial court's ruling that L.P. was incompetent as a witness—impossible. In such a case, if the child is deemed capable of being a witness for Confrontation Clause purposes, then the only way to avoid both these results is to hold the statement

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[35] It is not troublesome that, under our approach, the trier of fact would not see the child making a statement in its presence: (1) Even under a confrontation model, if a witness is not available at the time of trial but there was a prior opportunity for cross-examination, then a transcript of the earlier testimony may be admitted. *Crawford*, 541 U.S. at 53-54, 68. (2) The procedure allowed in *Craig*, *supra*, did not allow the jury to observe the demeanor of the child making the accusation. (3) Under the procedure we contemplate, the interview conducted by the acused's expert would presumably be videotaped.

nontestimonial. And this means that, if the same standards are applied to young children and to others, the likely consequence is that the Confrontation Clause will be unduly narrowed as a general matter. (For similar reasons, this case provides a particularly inappropriate vehicle to narrow the reach of the Clause by deciding general questions that apply beyond the context of young children. These include questions such as the scope of the "primary purpose" test and the extent to which statements made other than to law enforcement agents might be deemed testimonial for purposes of the Clause.[36])

The problem evaporates under the approach that we advocate: Statements of young children are addressed, and the rights of the accused are protected, outside the realm of the Confrontation Clause, and the jurisprudence of the Clause is allowed to develop within its proper realm, free of distortion that would be created by treating young children under the same rules as apply to older persons.

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[36] Lest there be any doubt: *Amicus* Friedman believes that the optimal test, briefly stated, for determining whether a statement is testimonial is whether a reasonable person in the position of the maker of the statement would anticipate likely prosecutorial use of the statement. *Melendez-Diaz*, *supra*, 557 U.S. at 310. And he believes that no artificial limits should be placed on this test. Thus, a statement even to a private person (such as a victims' counselor) may be testimonial in some circumstances, if a person in the position of the declarant would anticipate that the statement would be passed on and used prosecutorially; certainly a statement describing a crime and made to a teacher, especially one under a mandatory duty to report, can be testimonial.

CONCLUSION

The trial court committed constitutional error by admitting L.P.'s statement against Respondent without Respondent having had an opportunity of examination. Accordingly, this Court should affirm the judgment of the Ohio Supreme Court, which affirmed the decision of the Ohio Court of Appeals, reversing the judgment of conviction and remanding for a new trial. Further proceedings should be consistent with an opinion indicating that an examination of the type advocated in this brief is constitutionally acceptable.[37]

Respectfully submitted,

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January 14, 2015

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[37] *Cf. Hills v. Gautreaux*, 425 U.S. 284, 306 (1974) (affirming judgment of remand, and ordering that further proceedings of trial court should be consistent with opinion of this Court).

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Petitioner,

v.

DARIUS CLARK,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR THE INNOCENCE NETWORK AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Innocence Network is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide proof of innocence. The 66 current members of the Innocence Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand. The Innocence Network and its members are dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Innocence Network promotes study and reform designed to enhance the truth-seeking function of the criminal justice system and to ensure that future wrongful convictions are prevented.

The Innocence Network has helped to exonerate hundreds of individuals over the past two decades. From those experiences, the Innocence Network is aware that there are often significant problems with the reliability of child-witness testimony. Numerous convictions that rested largely on the testimony of children have subsequently been overturned when that testimony later proved to be unreliable. The Innocence Network's experience with wrongful convictions has also shown that a defendant's personal examination of

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk of Court.

witnesses against the accused—as opposed to their surrogates—is a fundamental safeguard of the truth-seeking function of the criminal justice system. Given these experiences, the Innocence Network has a strong interest in protecting the rights secured by the Confrontation Clause.

SUMMARY OF ARGUMENT

Inculpatory statements by child witnesses present particular reliability risks due to children's susceptibility to particular modes of questioning, suggestion, and coaching. The unreliability of child-witness testimony is established not only by an extensive body of research but also by numerous wrongful convictions that were secured on the basis of child-witness testimony that subsequently proved untrue.

The well-established reliability concerns about children's statements make the procedural safeguards secured by the Confrontation Clause particularly important in the context of child-witness testimony. *See Crawford* v. *Washington*, 541 U.S. 36, 61 (2004) (the Confrontation Clause's "ultimate goal is to ensure reliability of evidence"); *Michigan* v. *Bryant*, 131 S. Ct. 1143, 1157 (2011) ("[B]ecause the prospect of fabrication in statements given for the primary purpose of resolving [an] emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination."). These procedural protections include not just a defendant's opportunity to cross examine—the "'greatest legal engine ever invented for the discovery of truth'"—but also, of signal importance in the case of child witnesses, the jury's direct observation of "'the demeanor of the witness in making his statement,

thus aiding the jury in assessing his credibility.'" *Maryland* v. *Craig*, 497 U.S. 836, 866 (1990).

In the context of prosecutions involving a child victim, which often—as was true in this case—depend entirely on the statements of the child, the importance of the procedures secured by the Confrontation Clause cannot be overstated. In recent decades, however, state legislatures and courts have relaxed evidentiary rules for the use of child-declarant hearsay in order to facilitate criminal prosecutions where the victim-witnesses are children. As a result, many of the out-of-court statements for which the procedural protections secured by the Confrontation Clause are most important are now least likely to be afforded those protections by state rules of evidence. This confluence of factors—the significant potential for unreliable child-witness testimony, the often dispositive impact of child-witness testimony in certain prosecutions, and the prevalence of modern evidentiary rules that facilitate the use of such testimony without the procedural protections of cross examination or jury observation—demonstrates that categorically defining statements made by young children to teachers or care providers as non-testimonial would carry a significant risk of increasing the number of wrongful convictions.

Nor could such a categorical exclusion be justified under the Confrontation Clause. The Confrontation Clause requires that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. This provision was enacted in order to check the "use of *ex parte* examinations as evidence against the accused," *Crawford*, 541 U.S. at 50, especially the sort of "abuses" exemplified at the notorious treason trials of 16th and 17th century England. *Id.* at 50-51. A child's answer to

a question posed by a questioner acting on behalf of the state for law enforcement purposes, and aimed at determining how certain criminal acts transpired, is just such an abuse, as the child's answer reflects "precisely *what a witness does* on direct examination." *Davis* v. *Washington*, 547 U.S. 813, 830 (2006).

Statements made to mandated reporters who gather information about suspected abuse of a child pursuant to their statutory duties can therefore be testimonial, and the categorical rule that Ohio and its amici propose cannot be sustained. The mandatory reporting statutes make clear that teachers and other employees who serve as reporters by virtue of their employment act, at least in part, with an investigative purpose on behalf of the state when they question children upon observation of suspected abuse. Indeed, these reporting statutes *compel*—by making failure to comply a criminal offense—teachers and other reporters to provide evidence to facilitate prosecution. The statutes require mandated reporters to collect information about the cause of a child's injuries and the person or persons responsible for the abuse, often require reporters to generate written reports when requested, and some, like the Ohio statute in this case, authorize the reporter to document any injuries with photographs and x-rays. The statutes are thus designed to facilitate the state's gathering of information for prosecution by compelling certain categories of citizens to act in conjunction with law enforcement.

Moreover, as evidenced by both the statutes and the official guidance provided by states, the investigative and prosecutorial purposes of these laws is not concealed from the mandated reporter. The guidance prepared by the states, and in many instances, the statutes themselves, inform reporters that they may be

required to testify as a witness at a criminal trial. Statements made by children to questions posed by mandated reporters that elicit, on behalf of the government, the type of information that could be used during live testimony in court are thus testimonial.

The age or abilities of the child declarant do not change that conclusion. Indeed, courts, including this Court, have repeatedly applied the Confrontation Clause to exclude statements made by children as young as two-and-a-half when they determined that the statements were gathered during the course of an official investigation and were being used as a substitute for the type of information commonly produced during direct examination at trial. Moreover, even very young children understand that their statements may have punitive consequences for the accused. Thus, any categorical rule that a young child's statements to a mandated reporter cannot be testimonial would be contrary to this Court's precedent and the well-established understanding of the confrontation requirements.

ARGUMENT

I. Statements By Child Witnesses Present Particular Reliability Concerns

A. Statements By Child Witnesses May Lead To Errors For Several Reasons—Some Of Which Are Present In This Case

This Court, relying in part on a well-developed body of scientific research, has recognized the "problem of unreliable, induced, and even imagined child testimony." *Kennedy* v. *Louisiana*, 554 U.S. 407, 443 (2008); *see also id.* at 443-444 (referencing studies concluding "that children are highly susceptible to suggestive

questioning techniques like repetition, guided imagery, and selective reinforcement"); *see Arizona* v. *Youngblood*, 488 U.S. 51, 72 n.8 (1988) (Blackmun, J., dissenting) ("Studies show that children are more likely to make mistaken identifications than are adults, especially when they have been encouraged by adults."); *Idaho* v. *Wright*, 497 U.S. 805, 819 (1990) (recognizing that the avoidance of leading questions "may well enhance the reliability of out-of-court statements of children regarding sexual abuse"); *Maryland* v. *Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting) (noting "'special reasons'" to be suspicious of child testimony in light of "studies show[ing] that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality").

The "well-documented" and "serious" concerns about the reliability of child-witness testimony have also been noted by other courts. *See, e.g.*, *Fowler* v. *Sacramento County Sheriff's Dep't*, 421 F.3d 1027, 1039 n.7 (9th Cir. 2005) ("We note further that fantasy by child witnesses is well-documented."); *Danaipour* v. *McLarey*, 386 F.3d 289, 298 (1st Cir. 2004) (noting that "statements by a young child, even if accurately recounted by an adult, may not reflect the truth" for reasons including coaching, repeated inquiry, and a child's desire for attention); *Washington* v. *Schriver*, 255 F.3d 45, 57 (2d Cir. 2001) ("An emerging consensus in the case law relies upon scientific studies to conclude that suggestibility and improper interviewing techniques are serious issues with child witnesses[.]").

Indeed, within the child-development research community, "there is an overwhelming consensus that children are suggestible to a degree that ... must be regarded as significant." Ceci & Friedman, *The Suggesti-*

bility of Children: Scientific Research and Legal Implications, 86 Cornell L. Rev. 33, 36 (2000); *see also* Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2146 (1996) (describing a "consensus in the social-science literature" on this point); Goodman, *Children's Eyewitness Memory: A Modern History and Contemporary Commentary*, 62 J. Soc. Issues 811, 818-819 (2006) (acknowledging that, in the 1990s, "[i]t became increasingly clear ... that there were conditions under which children were susceptible to false suggestion").

There is also widespread support for the proposition that statements by child witnesses may lead to errors for the following reasons—some of which are present in this case:

- Children may make false accusations as a result of coaching or instigation by an adult, particularly by a parent. *See* Lyon, et al., *Coaching, Truth Induction, and Young Maltreated Children's False Allegations and False Denials*, 79 Child Dev. 914, 915 (2008) (adults who seek to influence a child's honesty "can successfully encourage children to make false allegations," including "in situations in which children's motivation was to conceal a parent's wrongdoing"); Ceci et al., *Children's Allegations of Sexual Abuse: Forensic and Scientific Issues*, 1 Psychol., Pub. Pol'y, & L. 494, 506 (1995) ("No one familiar with the scientific research ought to doubt that some children could be brought to make false claims of sexual abuse if powerful adults pursue them repeatedly with [suggestive] enjoinders.").

- Children may make false allegations against someone whom they have heard discussed in a negative light. Ceci & Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, 130-131 (1995) (citing study finding that 11% of five- and six-year-olds, after hearing prejudicial remarks regarding a particular individual, made false allegations against that individual).
- When interviewed, children are particularly susceptible to influence from direct or leading questions. *E.g.*, Lyon, et al., 79 Child Dev. at 915 ("direct questions" can "increase the likelihood of false allegations" by children and "children coached to make false allegations are more likely to do so in response to yes–no or forced-choice questions than in free recall"); Ceci & Bruck, *Children's Suggestibility: Characteristics & Mechanisms*, 34 Advances in Child Dev. & Behav. 247, 253 (2006) (children may provide answers to yes or no questions "even though they may not know the answer or understand the question"); Peterson & Bell, *Children's Memory for Traumatic Injury*, 67 Child Dev. 3045, 3059 (1996) (finding children made roughly five times as many errors in response to directed questions as compared to open-ended ones); Saywitz, et al., *Children's Memories of a Physical Examination Involving Genital Touch: Implications for Reports of Child Sexual Abuse*, 59 J. Consulting & Clinical Psychol. 682, 687 (1991) (finding 8% of the girls falsely reported sexual touching during a medical examination when researchers used leading questions).

- Children may be "more suggestible when questioned by an authority figure." *See* 1 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §1.10[B] (2005); Ceci & Bruck, *Jeopardy in the Courtroom* 258-259; *see also* Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 Duke L.J. 691, 692 (1991) (noting that children "are susceptible to accommodating their reports of events to fit what they perceive the adult questioner to believe").

- Children can give incorrect answers when they are led to believe that their initial answers were wrong, *see* Garven et al., *Allegations of Wrongdoing: The Effects of Reinforcement on Children's Mundane and Fantastic Claims*, 85 J. Applied Psychol. 38, 41-43 (2000), and may make false allegations if they believe that authority figures will not accept their initial accounts, *see* Ceci et al., *Unwarranted Assumptions about Children's Testimonial Accuracy*, 3 Ann. Rev. of Clinical Psychol. 311, 319 (2007); *see also* Ceci & Bruck, *Jeopardy in the Courtroom*, 259 (noting that children "are required to continue until the adult decides to terminate" the questioning).

Many of the above characteristics are present in this case. For example, the initial questioning of L.P. was performed by his teachers, obvious authority figures. In addition, when Deborah Jones first questioned L.P., she asked several direct questions, "Who did this? What happened to you?" (JA 59), and "[D]id [you] get a spanking?" (JA 79). Although L.P. provided an initial answer that failed to identify Respondent, this initial answer was not accepted by his teachers. And

when L.P. responded to a question with "Dee," Jones parroted the response back to him, supplying additional context: "What did you say? Dee? Dee did this?" JA 60.[2]

B. Many Wrongful Convictions Have Rested On Child-Witness Testimony Later Demonstrated To Be Unreliable Or False

This extensive body of social science research is not the only manifestation of the particular unreliability of child testimony providing "'special' reasons" to be wary of child testimony. *Craig*, 497 U.S. at 868 (Scalia, J., dissenting). Rather, numerous actual convictions have rested on child-witness testimony that was subsequently determined to be unreliable or untrue.

Even in cases in which a child's statements are subjected to cross examination, there are often significant concerns about the reliability of those statements. The case of Clarence Elkins provides an example. On the night of June 6, 1998, Elkins' six-year-old niece was sleeping at her grandmother's house when she awoke to hear her grandmother screaming. She ran to the kitchen and found her grandmother fighting with a man; she ran back to her bedroom and was sexually assaulted. The next thing she remembered was waking up to find her grandmother dead. The girl went to a neighbor's house and, after the police were called but

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[2] In addition, in this case, like many abuse cases, there are multiple caregivers who could have been responsible for the abuse—and thus the risk of an adult influencing a child's narrative is particularly acute. Indeed, the central issue at trial was not whether L.P. had been abused, but rather by whom, with a substantial amount of evidence and testimony suggesting that L.P.'s mother, Taheim T., and not Respondent, was the likely perpetrator of the abuse. *See* Resp. Br. 15.

before they arrived, allegedly told the neighbor that the attacker looked like her uncle Clarence. Elkins was subsequently convicted for the rape and murder of his mother-in-law and the rape of his niece. His conviction rested almost entirely on the testimony of his six-year-old niece. Bischoff & McCarty, *Murder, Then Rush to Judgment*, Dayton Daily News, August 6, 2006, at A8. In 2002, however, Elkins' niece recanted her testimony, explaining that her initial statement identifying her uncle Clarence meant only that the perpetrator reminded her of Elkins and that she only subsequently identified Elkins in testimony because prosecutors urged her to do so. Bischoff & McCarty, *My God, This Thing is Horrifying*, Dayton Daily News, August 8, 2006, at A6; *see also* Motion for Leave to Amend, Affidavit of Brooke Sutton, *Ohio v. Clarence Elkins*, No. CR 98061415 (Ohio Ct. C.P. Aug. 12, 2002). DNA evidence eventually led to Elkins' exoneration, and in August 2008, another individual pleaded guilty to aggravated murder, attempted murder, aggravated burglary, and rape in connection with the 1998 crime. McCarty, *A Guilty Plea Closes the Final Chapter on a Book of Horrors*, Dayton Daily News, August 24, 2008, at A6; *see also Elkins* v. *Summit County, Ohio*, 615 F.3d 671 (6th Cir. 2010).

Similarly, in 1984, Frederico Macias was convicted of capital felony murder, largely on the testimony of a nine-year-old witness. *See* Ceci & Bruck, *Jeopardy in the Courtroom*, at 17-18. Testifying at a stay of execution hearing four years later, however, the witness described the process that had elicited her original accusation: "I thought I might have seen something that would be helpful to the police. ... I thought they wanted me to be certain, so I said I was certain even though I wasn't. ... I answered questions I wasn't certain

about because I wanted to help the adults." *Id.* at 304. After nine years on death row, Macias secured habeas relief. *See Martinez-Macias* v. *Collins*, 979 F.2d 1067 (5th Cir. 1992). When the prosecution re-presented the case, a new grand jury found insufficient evidence to indict. *See* Cohen, *The Difference A Million Makes*, Time, June 9, 1995.

Barry Byars was charged in November 2001 with sexually assaulting his eleven-year-old niece after the girl, who had been taken to the police by her father, described two incidents of abuse. Byars decided to plead guilty in 2004, fearing a jury would not believe his denials and knowing he would face a lengthy prison term because of his prior convictions. In January 2005, the girl, by then a teenager, recanted her allegations. In an affidavit in support of Byars' application for a writ of habeas corpus, she stated that, at the time of her original accusation, her parents were divorced and she was living with her mother. She said that when she was interviewed by investigators, her father was waiting outside the interview room. "I knew that he was watching me," she said. "I felt that if I didn't say these things, that he would get real mad and at that time, I wanted to live with my father and no longer live with my mother. So without really thinking, I was willing to say just about anything." *See* Application for Writ of Habeas Corpus Exhibit A, Affidavit of Tyleigh Fuselier, *Ex parte Byars*, No. AP-75293 (Tex. Crim. App. Apr. 21, 2005). Byars' conviction was subsequently vacated. *See Ex parte Byars*, 176 S.W.3d 841 (Tex. Ct. Crim. App. 2005).

John Stoll spent twenty years in a California prison following his conviction for abusing six children, including his own son. After four of the children ultimately acknowledged that their trial testimony had been

"completely false" and a fifth claimed to have no memory of molestation, Stoll was released after the habeas court found that "improper interview techniques" employed by the investigating officers "created a substantial risk that [the victims'] trial testimony was unreliable." *Stoll* v. *County of Kern*, No. 1:1:05-cv-01059, 2007 WL 2815032, at *2 (E.D. Cal. Sept. 25, 2007).

It is also well documented that during the 1980's, "a series of highly publicized 'daycare ritual abuse cases' erupted across the United States." Garven et al., 85 J. Applied Psychol. at 38. Many of these cases led to convictions, but after the scope of suggestive interviewing techniques used in the investigations was exposed, more than half of the convictions were overturned. *See* Hayward & Mashberg, *Upheaval in '80s Put the Spotlight on Child Abuse*, Boston Herald, Dec. 3, 1995, at 23; *see also Devereaux* v. *Abbey*, 263 F.3d 1070, 1083 (9th Cir. 2001) (en banc) (Kleinfeld, J., concurring in part, dissenting in part) ("Wenatchee Washington seems to have been among the many towns engulfed by sexual witchhunts in the 1980's and 1990's," and after forty-three people had been charged with 29,727 counts of abuse, "few charges stood up in court except against the government's own witness"); Rabinowitz, *No Crueler Tyrannies* 10-21 (2003) (discussing the conviction and successful appeal of daycare teacher Margaret Kelly Michael); Ceci et al., *Unwarranted Assumptions About Children's Testimonial Accuracy*, 3 Ann. Rev. of Clinical Psychol. at, 319 (2007) (describing investigations in Jordan, Minnesota, that caused an eleven-year-old boy to accuse his parents because he was "just sick of being badgered"); *Craig*, 497 U.S. at 868 (Scalia, J., dissenting) (referring to the "tragic" investigations in Jordan, Minnesota).

Moreover, it can be exceedingly difficult to unwind a wrongful conviction once it has been improperly secured. For example, in 1988, this Court upheld the defendant's rape conviction in *Arizona* v. *Youngblood* against a due process challenge. 488 U.S. 51. That conviction was primarily based on the ten-year-old victim's identification of Youngblood as the perpetrator. *Id.* at 53; *see also id.* at 72 (Blackmun, J., dissenting). Twelve years after that decision, Youngblood was exonerated by DNA evidence. *See* Whitaker, *DNA Frees Inmate Years After Justices Rejected Plea*, N.Y. Times, Aug. 11, 2000, at A12.

II. The Unreliability Of Child-Witness Testimony Underscores The Importance Of Confrontation, Particularly As The States Have Weakened Hearsay Standards For Child Witnesses

The documented unreliability of child-witness testimony makes it especially important to maintain the procedural protections secured by the Confrontation Clause in cases involving child witnesses, particularly in cases in which a child witness's testimony is so central to conviction. *See Crawford*, 541 U.S. at 61 (the Confrontation Clause's "ultimate goal is to ensure reliability of evidence"); *Coy* v. *Iowa*, 487 U.S. 1012, 1020 (1988) (recognizing the role of confrontation in "reveal[ing] the child coached by a malevolent adult").

Those protections include not just the right of cross examination but also the right to have the jury observe the witness, in order to "look at him, and judge by ... the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U.S. 237, 242-243 (1895). Indeed, simply observing a young child, such as the three-and-a-half-year-old victim in this case, would allow jurors to assess the reliability of

his or her statement in a way they cannot when a teacher, often regarded as having unique insight into a child's perspective, testifies at trial as to the absent child's statements. *See Craig*, 497 U.S. at 846 ("physical presence" and "observation of demeanor by the trier of fact" are two "elements of confrontation" that "ensur[e] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings").

In recent decades, however, many states have revised historical rules of evidence regarding the use of child-declarant hearsay in order to facilitate criminal prosecutions where the victims or witnesses are children. Most states have enacted hearsay exceptions—like the Ohio exception in this case—that are specifically designed to facilitate admission of out-of-court statements by child witnesses. Lyon & Dente, *Child Witnesses and the Confrontation Clause*, 102 J. of Crim. L. & Criminology 1181, 1183 (2012) ("Most states have such exceptions, which were promulgated to address the difficulties of proving child abuse ...." (citing National Center for Prosecution of Child Abuse, *Investigation and Prosecution of Child Abuse* (3d ed. 2004)). As a result, the Confrontation Clause's procedural protections of cross examination and juror observation are unlikely to be secured through contemporary rules of evidence.

In addition to the general reliability challenges presented by child testimony, there are unique challenges presented by the admission of out-of-court statements made to teachers or other care providers designated as mandated reporters (like the statements at issue in this case). Although "[o]fficial investigators may be trained to avoid suggestiveness; most parents

and teachers are not." Ceci & Friedman, 86 Cornell L. Rev. at 59. The heightened potential for unreliability in cases involving questioners who may not be trained to avoid suggestiveness underscores the need to subject statements elicited by them to the crucible of cross-examination.

Given the serious concerns regarding the accuracy of statements by child witnesses, the importance of confrontation to the truth-seeking process, and the existence of state evidentiary rules eroding the usual procedural protections in cases of child testimony, a categorical rule excluding statements by children to teachers or other mandated reporters from the ambit of the Confrontation Clause would pose significant risks of increasing the likelihood of wrongful convictions.

III. Statements By Children To Mandated Reporters Can Be, And Often Are, Testimonial

The history and purpose of the Confrontation Clause make clear that neither the fact that the questioner was a teacher nor the fact that the declarant was a young child renders L.P.'s statements non-testimonial. Indeed, when deciding if particular statements by a child to his or her teachers are testimonial, the Confrontation Clause allows for a court to reasonably consider the mandatory reporting obligations of the teacher.

A. Statements To Non-Law Enforcement May Still Be Testimonial

The Confrontation Clause applies to all "witnesses" against the accused or all "those who 'bear testimony.'" *Crawford*, 541 U.S. at 51. Based on this foundational principle, this Court has repeatedly reaffirmed that any "accuser who makes a formal statement to government

officers," *id.*, that could be used as a "substitute for live testimony," must be available to be cross examined "because they do precisely *what a witness does* on direct examination," *Davis*, 547 U.S. at 830. This fulfills the Confrontation Clause's ultimate goal of securing a defendant's right to test the reliability of testimony of any witness against him "in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

In determining whether an out-of-court statement made in response to a question is testimonial, the key is to determine whether the "primary purpose of the interrogation" is "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822; *see also Bryant*, 131 S. Ct. at 1165 (same). A statement made in response to a question is testimonial if the questioner is "performing investigative functions," *Crawford*, 541 U.S. at 53, that are aimed at discerning "how potentially criminal past events began and progressed" and who was responsible for the putative criminal acts. *Davis*, 547 U.S. at 830. Thus, as this Court noted in *Davis*, "[i]f 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers." 547 U.S. at 823 n.2.

Relying on these principles, federal and state courts routinely find that statements made to individuals outside of law enforcement who nevertheless are performing investigative functions for law enforcement purposes are testimonial. *E.g.*, *McCarley* v. *Kelly*, 759 F.3d 535, 546 (6th Cir. 2014) (statements to child psychologist working at direction of law enforcement); *Bobadilla* v. *Carlson*, 575 F.3d 785, 791–793 (8th Cir. 2009) (questioning of child by social worker); *T.P* v. *State*, 911 So. 2d 1117, 1123 (Ala. Crim. App. 2004) (statements to social worker and investigator as part of

criminal investigation); *People* v. *Sharp*, 155 P.3d 577, 581 (Colo. App. 2006) (statements to forensic interviewer during visit arranged by police); *Hernandez* v. *State*, 946 So.2d 1270, 1271 (Fla. Dist. Ct. App. 2007) (statements made to "Child Protection Team" nurse); *People* v. *Stechly*, 870 N.E.2d 333, 364 (Ill. 2007) (statements to hospital's clinical specialist); *Rangel* v. *State*, 199 S.W.3d 523, 534 (Tex. App. 2006) (statements to child protective services). These cases correctly reflect that, where statements are made to questioners performing investigative functions for law enforcement purposes, they are testimonial and therefore subject to the Confrontation Clause.

B. The Questioner's Mandatory Reporting Obligations Are Relevant To Determining Whether A Statement Is Testimonial

"In determining whether a declarant's statements are testimonial, courts should look to *all* of the relevant circumstances" that bear on the interrogation in which the statements were made. *Bryant*, 131 S. Ct. at 1162 (emphasis added); *see also id.* (requiring evaluation of "the statements and actions of the parties to the encounter, *in light of the circumstances in which the interrogation occurs*" (emphasis added)).

The mandatory reporting obligations that prompted the questioning in this case provide one such "relevant circumstance[.]" Just as it was necessary in *Crawford* to understand the Marian statutes under which "[j]ustices of the peace [were] conducting examinations" in order to conclude that they were performing "an essentially investigative and prosecutorial function," *Crawford*, 541 U.S. at 53, a court should consider the reporting statutes in order to ascertain the purpose of a mandated reporter's questioning. As shown below,

these statutes are designed to enlist the reporters' assistance in securing evidence needed for criminal prosecution, and thus, the product of this questioning is subject to confrontation rights because it reflects the "[i]nvolvement of government officers in the production of testimony with an eye toward trial." *Crawford*, 541 U.S. at 56 n.7; *see also Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 557 U.S. 305, 311 (2009) ("not only were the affidavits made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, but under Massachusetts law the *sole purpose* of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance" (citations and internal quotation marks omitted)). Finally, the mandated reporter's legal obligations provide the necessary context to interpret "'the content and tenor'" of the reporter's questions, which "can illuminate the 'primary purpose of the interrogation.'" *Bryant*, 131 S. Ct. at 1162; *see also id.* at 1169 (Scalia, J., dissenting).

C. Mandatory Reporting Statutes Are Designed To Secure Evidence For Criminal Prosecution

Mandatory reporting statutes are specifically designed to enlist reporters' assistance in securing evidence for criminal prosecution. The Ohio statute at issue in this case expressly contemplates the collection of information "directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 547 U.S. at 826. The law requires that such a report contain, in addition to information concerning the child's injuries, "[a]ny other information that might be helpful in establishing the

cause of the injury, abuse, or neglect." Ohio Rev. Code Ann. § 2151.421(C)(3). In another provision, the statute directs the Department of Children and Family Services to investigate, "in cooperation with the law enforcement agency," each report generated by a mandated reporter to determine, among other things, "the cause of the injuries, abuse, [or] neglect," and "make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect any children that are brought to its attention." *Id.* § 2151.421(F)(1), (2). In light of these characteristics, the Ohio Supreme Court was surely correct to find in this case that the "prosecution for criminal acts of child abuse is expressly contemplated by the reporting statute as a means of protecting children." Pet. App. 8a.

The statute also explicitly authorizes the reporter to engage in the collection of potential evidence for a criminal prosecution by specifically permitting reporters to take photographs and x-rays of the victim. Ohio Rev. Code Ann. § 2151.421(C). In addition, Ohio law requires the mandated reporter to generate a written report upon the request of the child services agency or law enforcement officer receiving the initial report. *Id.*

The design of Ohio's statute is far from unique. In general, mandatory reporting statutes facilitate the eventual criminal prosecution of those responsible for the abuse that triggers the reporters' obligations. At least some of the statutes explicitly state this purpose. *See, e.g.*, Ark. Code Ann. § 12-18-102 ("The purpose of this chapter is to: ... Encourage the cooperation of state law enforcement officials, courts, and state agencies in the investigation, assessment, *prosecution*, and treatment of child maltreatment."(emphasis added)). Some of the mandatory reporting statutes are actually codi-

fied within state penal codes. *See, e.g.*, Cal. Penal Code §§ 11164 *et seq.*; Ariz. Rev. Stat. Ann. § 13-3620 *et seq.*

The mandatory reporting statutes also typically provide for the involvement of law enforcement following a report under the statute. Many jurisdictions explicitly require that the police be involved with the investigation of a report of abuse if there is any indication that a crime may have occurred. *E.g.*, D.C. Code § 4-1301.04 ("The initial phase of the investigation [of "a report of suspected child abuse or neglect"] shall ... include notification and coordination with the Metropolitan Police Department when there is indication of a crime[.]"); 325 Ill. Comp. Stat. 5/7.3(b) ("[T]he Department shall adopt rules expressly allowing law enforcement personnel to investigate reports of suspected child abuse or neglect concurrently with the Department[.]"). A number of states also specifically require that child welfare agencies and police freely share information as part of their shared responsibilities for investigating alleged abuse. *See, e.g.*, Kan. Stat. Ann. § 38-2226(b) ("investigation shall be conducted as a joint effort between the secretary and the appropriate law enforcement agency or agencies, with a free exchange of information between them").

Other states have established joint task forces or multidisciplinary teams comprised of child welfare workers and law enforcement officials. *See* Conn. Gen. Stat. Ann. § 17a-105a (providing for a child abuse division within the state police that can assist "a multidisciplinary team... in the investigation of a report of child abuse"); D.C. Code § 4-1301.51(a) (requiring a "multidisciplinary investigation team" to review and investigate any instance of alleged sexual abuse, focusing on "the needs of the child, and...on the law enforcement, prosecution, and related civil proceedings."); Idaho

Code Ann. § 16-1617(1) & (2) (requiring "an interagency multidisciplinary team" that includes "law enforcement personnel" and is "responsible for developing a written protocol for investigation of child abuse cases and for interviewing alleged victims of such abuse or neglect[.]"). Even in states where a child welfare agency, rather than law enforcement, is charged with receiving or preparing the initial report regarding alleged abuse, such reports often must be forwarded to local law enforcement if they contain grounds for concluding that a child suffered criminal abuse or neglect. *See, e.g.*, Fla. Stat. Ann. § 39.301(2)(a), (b); Mich. Comp. Laws § 722.628(3). These highly structured efforts demonstrate the extent to which mandated reporters are compelled to provide information for law enforcement purposes when confronted with potential abuse.

And, as is true in Ohio, many states require the reporter to provide information that is directed to "establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 547 U.S. at 826. For example, Georgia's reporting statute requires that all reports regarding child abuse "contain ... the nature and extent of the child's injuries, including any *evidence* of previous injuries, and any other information that the reporting person believes might be *helpful in establishing* the cause of the injuries and *the identity of the perpetrator*." Ga. Code Ann. § 19-7-5(e) (emphases added); *see also* Iowa Code Ann. § 232.70(6) (a report must include information which "might be *helpful in establishing* the cause of the injury to the child, *the identity of the person or persons responsible for the injury*, or in providing assistance to the child"(emphases added)).

Many statutes, like Ohio's, also authorize mandated reporters to collect particular types of evidence of the

abuse. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3620(I) (allowing any person who takes an abuse report to take photos "of the minor and the vicinity involved"); Me. Rev. Stat. tit. 22, § 4011-A(5) ("Whenever a person is required to report as a staff member of a law enforcement agency or a hospital, that person shall make reasonable efforts to take, or cause to be taken, color photographs of any areas of trauma visible on a child.").

Nor is there any basis to assume that individuals who serve as mandated reporters by virtue of their employment are unaware of their obligations or of the potential use of the contents of their reports as evidence in a criminal prosecution. As one commentator noted about medical professionals subject to mandatory reporting laws, there "is every reason to assume that the vast majority of doctors and nurses are aware both of reporting requirements and the admissibility of many statements made to them during the examination process." Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 Ind. L.J. 917, 952 (2007).

In addition to the expectation that professionals are familiar with the laws that regulate their conduct, states publish guides and offer training courses for mandated reporters, and these resources often specifically instruct mandated reporters to collect information relevant to criminal investigation and prosecution. *See, e.g.*, Minnesota Department of Human Services, *Reporting Child Abuse and Neglect: A Resource Guide for Mandated Reporters*, at 3 (2012), *available at* https://edocs.dhs.state.mn.us/lfserver/Public/DHS-2917-ENG (directing mandated reporters to be prepared to provide a: "description of when and where the incident occurred and what happened to the child[;] ... [a] description of any injuries and the present condition

of the child; ... the names and addresses of the child, parents or caregivers"); Florida Department of Children and Families, *Reporting Abuse of Children and Vulnerable Adults* (2013), *available at* http://www.dcf.state.fl.us/programs/abuse/publications/mandatedreporters.pdf (instructing mandated reporters that "specific descriptions of the incident(s) or the circumstances contributing to the risk of harm are very important. This includes **who** was involved, **what** occurred, **when** and **where** it occurred, **why** it happened, the extent of any injuries sustained, and what the victim(s) said happened, and any other pertinent information." (emphasis in original)).

Some guidance provided by state agencies expressly notes the potential reliance on mandated reports in subsequent court proceedings. For example, a training offered by the District of Columbia informs mandated reporters: "Be aware that if the case proceeds to a trial, you may be called to testify as a witness and your identity would be revealed in court." D.C. Child and Family Services Agency, *Keeping DC Children and Youth Safe: Online Mandated Reporter Training* (available at https://dc.mandatedreporter.org/public/pdf/en_US/FAQ.pdf). (last visited Jan. 13, 2015) Similarly, guidance provided to reporters in Pennsylvania instructs them, in response to the question "Will I have to testify in court?" that "Criminal charges are filed against some perpetrators. You may be subpoenaed to testify at a criminal proceeding." Pennsylvania Department of Public Welfare, *Mandated Reporters* (Sept. 2012) *available at* http://www.dpw.state.pa.us/cs/groups/webcontent/documents/communication/p_011835.pdf). Some guidance to reporters actually requests verbatim transcription of a child's statements. For example, guidance published to Kern County (California)

reporters instructs that "[i]f a child discloses circumstances that lead you to believe he or she is being abused or neglected, you will need to document these statements using quotes if possible." *See* Kern County Department of Human Resources, *A Guide to Mandated Reporting Responsibilities*, (Sept. 2009), *available at* http://kerncares.org/wp-files/kerncares-org/2011/02/Mandated-Reporter-Manual2009ReadOnly_StaffDev_.pdf.[3]

As the characteristics detailed above show, many of these mandatory reporting statutes: (1) are designed to secure evidence for subsequent prosecution; (2) inform the reporter of that potential use of reported information; and (3) attempt to provide the reporter with the tools and training needed to effectively obtain such evidence. The full force of the state's investigative authority is thus engaged when a teacher or other mandated reporter observes evidence of abuse, which is only underscored by the fact that many states, including

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[3] It also bears noting that numerous mandatory reporting statutes specifically provide for the waiver of certain privileges (*e.g.*, the doctor-patient privilege) if the reporter is called to "*give evidence*" or "*testify*" regarding the report in a subsequent court proceeding. For example, the model mandatory reporting statute proposed in 1975 provided: "Such privileged communications, excluding those of attorney and client, shall not constitute grounds for failure to report as required or permitted by this Act, to cooperate with the child protective service in its activities pursuant to this Act, *or to give or accept evidence in any judicial proceeding relating to child abuse, sexual abuse or neglect.*" Child Abuse & Neglect Project, Education Comm'n of the States, Report No. 71, *Child Abuse and Neglect: Model Legislation for the States* 30 (1975), (emphasis added) (cited in Mosteller, *Child Abuse Reporting Laws and Attorney Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 Duke L.J. 203, 214 & n.31 (1992)); *see also* Mass. Gen. Laws Ann. ch. 119, § 51A(j); Mich. Comp. Laws § 722.631.

Ohio, make failure to report suspected child abuse a criminal offense. *E.g.*, Ohio Rev. Code § 2151.99(C); R.I. Gen. Laws § 40-11-6.1; Texas Fam. Code § 261.109. Moreover, the additional threat of potential civil liability for a failure to report, like the one included in Ohio's statute, *see* Ohio Rev. Code § 2151.421(M), increases the likelihood that an institution, such as Head Start in this case, will feel compelled to ensure that its employees proactively gather information and contact law enforcement in order to fulfill their obligations. There can be little doubt, then, that when teachers question a child about suspected abuse based on a duty imposed by a mandatory reporting statute, they often will be performing an investigative function for law enforcement purposes.

Contrary to arguments by some of Ohio's amici, protecting children who are abused and prosecuting their abusers are complementary, not mutually exclusive, purposes. Just as police officers can have "dual responsibilities" relating to public safety and criminal investigation and may "act with different motives simultaneously or in quick succession," *Bryant*, 131 S. Ct. at 1161, mandated reporters can have multiple motives, which will be informed by their statutory reporting obligations. Whether these motives result in the reporter eliciting testimonial statements can be determined based on an objective review of the primary purpose of the questioning. Questions meant to determine "what happened" rather than "what is happening" are more likely to elicit information that more closely tracks the types of statements that might be made in court. *Davis*, 547 U.S. at 830. Because mandated reporters are charged by these statutes with performing investigative functions meant to aid in potential criminal prosecutions, teachers and others can act with the primary

purpose of eliciting testimonial statements. As this Court has instructed, the product of questioning "directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" is testimonial. *Id.* at 826.

D. If The Purpose Of The Question Is To Obtain Information For Use In The Investigation Or Prosecution Of A Crime, The Fact That The Declarant Is A Young Child Does Not Make The Response Non-Testimonial

In determining whether statements made as a result of questioning were testimonial, the focus of this Court's analysis is not the "subjective or actual purpose" of the declarant, but rather an "objective analysis" of "the statements and actions of the parties" to assess "'the primary purpose of the interrogation.'" *Bryant*, 131 S. Ct. at 1156 (emphasis added); *see also id.* at 1162.

Where, as in this case, the questions (and thus the responses) derive from mandatory reporting statutes reflecting governmental involvement "in the production of testimony with an eye toward trial," *Crawford*, 541 U.S. 36 at 56 n.7, and the purpose of the interrogation is to elicit statements that are capable of "establishing or proving some fact at trial," *Melendez-Diaz*, 557 U.S. at 324, the fact that the declarant is a young child should not alter the conclusion that the purpose of the interrogation is testimonial. Although Ohio argues (Pet. Br. 11) that an "incompetency finding shows that [a child's] out-of-court statements could not have been 'witness' testimony" for purposes of the Confrontation Clause, that argument substitutes one concept (competency)

for another (testimony).[4] The relationship between these concepts in fact compels the opposite conclusion. Where, as here, a trial court determines a child could not testify because he cannot recount facts or comprehend the nature of his testimony, there could be no meaningful right of confrontation at trial. As the Sixth Amendment animates why his testimony could not be heard in court, it also bars the prosecution from introducing his out-of-court statements when they are used as a substitute for live testimony.[5]

Consistent with these principles, this Court has often found that out-of-court statements made by very young children fall within the ambit of the Confrontation Clause. *See Crawford*, 541 U.S. at 58 n.8 (noting that the statements that a four-year-old made to "to an investigating police officer" in *White* v. *Illinois*, 502

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[4] Ohio also suggests that *competent* children who do not "'understand the legal system'" may be incapable of providing testimony (Pet. Br. 31 (quoting *State* v. *Bobadilla*, 709 N.W.2d 243, 256 (Minn. 2006))), but there is no sound basis for such a proposition. *Cf. Bobadilla* v. *Carlson*, 575 F.3d 785, 791–93 (8th Cir. 2009) (finding three-year-old's statements testimonial and affirming grant of habeas petition). Such a rule would allow the widespread introduction of statements given by competent witnesses (e.g., an 11-year-old child) to law enforcement simply because the witness does not understand the legal process.

[5] Indeed, police interrogations of children who are incompetent to testify would be akin to unsworn hearsay under the Marian statutes, which would also not have been admissible. *See generally Crawford*, 541 U.S. at 52 n.3. Ohio's position thus misunderstands the relationship of competency and testimony—it is not whether the hearsay is sworn and attested that determines whether cross-examination is required, but rather the precept that live testimony is required for reliability. Even sworn affidavits require confrontation; necessarily, hearsay that is even less reliable does too. *See id.*

U.S. 346 (1992), were "testimonial"); *Idaho* v. *Wright*, 497 U.S. 805, 826 (1990) (affirming the exclusion of statements made by a two-and-a-half-year-old child to a physician).

Similarly, lower federal and state courts routinely hold that statements made by very young children may be testimonial. *E.g.*, *McCarley* v. *Kelly*, 759 F.3d 535 (6th Cir. 2014) (three-and-a-half–year-old); *Bobadilla*, 575 F.3d at 791–793 (three-year-old); *T.P.*, 911 So. 2d at 1123 (eight-year-old); *People* v. *Sisavath* 13 Cal. Rptr. 3d 753, 758 n.3 (2004) (four-year-old); *State* v. *Henderson*, 160 P.3d 776, 792 (Kan. 2007) (three-year-old). Indeed, numerous decisions reject the argument that a child's statements are necessarily non-testimonial simply because the child would not be able to understand that the statements were likely to be used in a later criminal proceeding. *See People* v. *Vigil*, 127 P.3d 916, 926 n. 8 (Colo. 2006) ("[I]f a child makes a statement to a government agent as part of a police interrogation, his statement is testimonial irrespective of the child's expectations regarding whether the statement will be available for use at a later trial."); *State* v. *Snowden*, 867 A.2d 314, 328-329 (Md. 2005) ("[W]e are unwilling to conclude that, as a matter of law, young children's statements cannot possess the same testimonial nature as those of other, more clearly competent declarants."); *Henderson*, 160 P.3d at 785 ("A young victim's awareness, or lack thereof, that her statement would be used to prosecute, is not dispositive of whether her statement is testimonial." (citing *State* v. *Justus*, 205 S.W.3d 872 (Mo. 2006))).[6]

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[6] In fact, up until the time that Respondent moved to exclude L.P.'s out-of-court statements under the Confrontation Clause, Ohio *also* considered L.P.'s statements to be "testimonial," insofar

Categorically excluding young children's statements from the scope of the Confrontation Clause would have a sweeping effect on criminal prosecutions. Although many of Ohio's amici focus on child abuse cases, children serve as witnesses in all manner of criminal prosecutions. If children's cognitive abilities prevent them from acting as a "witness" within the meaning of the Clause, the same would hold true for many adult witnesses who commonly provide statements in the course of criminal investigations, including those with mental disabilities or mental illnesses or those who are impaired by the use of narcotics or alcohol.

Even if the understanding of a reasonable (or average) child of the declarant's age—as opposed to the objective purpose of the questioning—was necessary to determine the "purpose of the interrogation," children possess a sufficient understanding of their accusations to satisfy this requirement, were it to exist. For example, "abuse victims often report that their decision regarding whether and when to disclose was affected by their expectations about how others would react to their disclosure *and the effects of disclosure on* themselves and *others close to them*." Lyon, et al., *Coaching, Truth Induction, and Young Maltreated Children's False Allegations and False Denials*, 79 Child Dev. 914, 915 (2008) (emphasis added). And it has been documented in several studies that "[c]hildren are less likely to disclose abuse by parents than by strangers," and that "[a]buse by parents is less likely than abuse by

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as Ohio's actions in singling out a suspect, attributing L.P.'s injuries to that suspect, and arresting and charging Respondent demonstrate that Ohio considered L.P.'s statements to be a sufficiently "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford*, 541 U.S. at 51.

strangers to be reported to the police." Lyon, et al., *Children's Reasoning About Disclosing Adult Transgressions: Effects of Maltreatment, Child Age, and Adult Identity*, 81 Child Dev., 1714-1715 (2010); *see also Pennsylvania* v. *Ritchie*, 480 U.S. 39, 60 (1987) (A "child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent."). In some cases, moreover, a child is aware of the consequences of disclosure precisely because an adult has warned the child not to reveal the abuse. *See* Smith & Elstein, *The Prosecution of Child Sexual and Physical Abuse Cases: Final Report 93* (1993) (threats not to reveal abuse included "pleas that the abuser would get into trouble if the child told"). Thus, there is no basis, objective or subjective, to categorically exempt statements made by young children to a mandated reporter from the protections of the Confrontation Clause.

CONCLUSION

The judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Ohio

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that both parties have consented to this filing as reflected in the blanket consent letters noted on the docket.

knowing whether surrogates may be used to introduce statements of non-testifying witnesses.

In the wake of *Crawford v. Washington*, 541 U.S. 36 (2004), courts have routinely wrestled with the question whether the Confrontation Clause permits this form of surrogate testimony. This practice poses serious problems because it fundamentally alters the structure of a criminal trial, hampers its truth-seeking function, and ultimately threatens the integrity of our criminal justice system.

SUMMARY OF ARGUMENT

The instant case must be viewed in the context of the nationwide shift away from police interviewing potential victims of child abuse. States increasingly rely on professionals other than police and prosecutors to investigate child-abuse cases. The recognized best practice in child-abuse cases is the use of teams comprised of professionals from multiple disciplines who work together to detect, prevent, and investigate child abuse. Indeed, multidisciplinary teams for child-abuse investigations are mandated by law in many states. The primary purpose of interviews conducted by members of these multidisciplinary teams – including teachers – is to establish past events potentially relevant to future criminal prosecution.

Reversing the Ohio Supreme Court in this case would give law enforcement officials a roadmap for exempting from cross-examination nearly all victim

testimony in child-abuse cases. This has it exactly backwards. The constitutionally prescribed test of reliability is especially important in child-abuse cases because, as this Court has acknowledged, children are particularly susceptible to suggestion and unreliable testimony.

ARGUMENT

I. TEACHERS PLAY A CRITICAL ROLE IN THE PROSECUTION OF CHILD-ABUSE CASES.

Teachers are in a unique position to detect child abuse. Because they have regular contact with the children under their care, these professionals can readily observe a child's change in behavior, habits, and hygiene. Such changes may point toward physical or sexual abuse that would otherwise go undetected. *See, e.g.*, U.S. Department of Health and Human Services, *What Is Child Abuse and Neglect? Recognizing the Signs and Symptoms* 5-7 (July 2013). For that reason, it is common for teachers and school administrators to receive specialized training to recognize and respond to signs of child abuse. *See, e.g.*, Va. Code § 22.1-298.1 (requiring teachers to receive training in recognizing child abuse as condition of licensure).

Recognizing this reality, states began to enact mandatory-reporting laws. These laws place a legal obligation on professionals who have regular contact

with children, like teachers, to report suspected child abuse or neglect. *See, e.g.*, Ohio Rev. Code § 2151.421. Mandatory reporting laws currently exist in all 50 states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. *See generally* U.S. Department of Health and Human Services, *Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws* (2014). All of these mandatory reporting laws include teachers within their scope. *See id.*

The threshold for a mandatory reporter to report abuse or neglect under these laws is extremely low. Typically, these statutes require a mandatory reporter to notify law enforcement or social services when abuse is merely *suspected*. *See, e.g.*, Ohio Rev. Code § 2151.421 (report required when person knows or suspects that a child has suffered abuse); *see also, e.g.*, Alaska Stat. §§ 47.17.020, 47.17.023 (report required where there is "reasonable cause to suspect" that a child has suffered abuse); Colo. Rev. Stat. § 19-3-304 (report required upon "reasonable cause to know or suspect that a child has been subjected to abuse").

II. TEACHERS QUESTION ABUSED CHILDREN FOR THE PRIMARY PURPOSE OF GATHERING EVIDENCE FOR FUTURE PROSECUTION.

To determine the testimonial nature of a statement, courts must determine the primary purpose of

the interrogation. *See Michigan v. Bryant*, 562 U.S. 344, 131 S. Ct. 1143, 1154 (2011). If the primary purpose of the interrogation is to establish past events potentially relevant to future criminal prosecution, the statements are testimonial, and therefore, subject to the Confrontation Clause. *Id.* To determine the primary purpose of an interrogation, courts examine factors such as the circumstances under which an encounter occurs and the statements and actions of *both* the declarant and the interrogators. *Id.* at 1160; *see also Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009).

Under the mandatory-reporting laws in every state, teachers *must* share their findings of potential abuse – including statements by victims – with law enforcement officials or child protective services under penalty of law. Through training and the text of the applicable statutes themselves, teachers necessarily understand that, when questioning a child about suspected abuse, they will be required to report the details of the interview promptly to law enforcement or child protective services. They understand that the statements they elicit will be an important part of any subsequent criminal prosecution. And they understand that the information the child provides will be an important part of any criminal investigation. Consequently, teachers must be treated like law enforcement officers for Confrontation Clause purposes. *See, e.g., Crawford*, 541 U.S. at 53 (while discussing the historical foundations of the Sixth

Amendment, noting that "it is not surprising that other government officers performed the investigative functions [under the Marian statutes] now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.").

States depend on evidence gathered by teachers to prosecute child-abuse cases. Teachers' daily contact and rapport with children put them at the forefront of child-abuse investigations. Their specialized training allows them to recognize and develop facts regarding suspected abuse long before law enforcement takes an active role in any investigation. And their role as mandatory reporters ensures that this information will eventually make its way to law enforcement, either directly or through another state agency, where it will be available in any subsequent prosecution and investigation. Indeed, several state *amici* openly admitted to the Court in this case that their child-abuse prosecutions depend on the surrogate testimony of teachers and other caregivers. (*See* Brief for the States of Washington, Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, South Carolina, Tennessee, Texas, Vermont, West Virginia, Wisconsin, and Wyoming as Amici Curiae in Support of Petitioner, p. 5) ("Evidence from caregivers is often critical to the prosecution of these difficult cases.").

All of these circumstances combine to create a regulatory regime in which a teacher's primary purpose in questioning abused children is often to gather evidence for criminal prosecutions or investigations. *See Child Abuse & Neglect*, Office of Essex County District Attorney Jonathan W. Blodgett (Oct. 2005), *available at* http://www.mass.gov/essexda/docs/publications/child-abuse/br-51a-child-abuse-and-neglect.pdf ("Mandatory reporting is the first step to initiating the investigation of child abuse and is essential to our mission to identify and prosecute those who prey upon children in Essex County."). This primary purpose qualifies the child's responses as testimonial. Consequently, these statements cannot be used against the defendant in a subsequent criminal prosecution, absent unavailability and the opportunity to cross-examine the declarant.

III. STATES ASSIGN OTHER NON-LAW ENFORCEMENT OFFICIALS TO INVESTIGATE CHILD-ABUSE CASES.

It is critical to assess the Confrontation Clause question in this case in light of the practical realities of child-abuse investigations. In practice, most states choose to deploy mandatory reporters and child welfare officials as "first responders" in child-abuse investigations. The choice of those professionals – instead of police and prosecutors – is intentional. An effective child-abuse investigator needs particularized training and experience with the unique psychology of children. Traditional police investigators often are

not suited for this task, especially in the case of children traumatized by abuse. Subjecting abused children to repeated questioning about the abuse can inflict additional trauma on an already traumatized child. States recognize that they need to employ special investigative methods to address the unique challenges they face in child-abuse cases.

To address these challenges, most states deploy "multidisciplinary teams" to detect, prevent, and investigate child abuse. A multidisciplinary team is "a group of professionals who work together in a coordinated and collaborative manner to ensure an effective response to reports of child abuse and neglect." Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Forming a Multidisciplinary Team to Investigate Child Abuse* 2 (2000); *see also* National Children's Advocacy Center, *Multidisciplinary Team*, *available at* www.nationalcac.org/about/multi-team.html (last visited Jan. 2, 2015) (the multidisciplinary team approach is "widely adopted as a best practice in responding to child sexual abuse in the United States"); Jennifer Van Pelt, *Multidisciplinary Child Protection Teams – the Social Worker's Role*, 13 Social Work Today 2, at 26 (Mar./Apr. 2013) (noting a "growing emphasis on multidisciplinary approaches" because "[p]rofessionals have recognized that children live in the real world where they go to school, live at home or at a caregiver's home, and have behavioral health and/or medical issues, all of which reach across disciplines."). These teams typically include law enforcement, child protective services workers,

physicians, mental health professionals, victim advocates, and educators. Because of their specialized training, it is widely recognized that multidisciplinary teams are "the best response to the challenge of child abuse and neglect investigations." *Forming a Multidisciplinary Team*, at 4.

Use of multidisciplinary teams is the preferred method of investigating child-abuse cases in nearly every state. *See* National Children's Advocacy Center, *Multidisciplinary Team*, *available at* www.nationalcac.org/about/multi-team.html (last visited Jan. 2, 2015) (the multidisciplinary team approach is "widely adopted as a best practice in responding to child sexual abuse in the United States"); *see also, e.g.*, Pennsylvania Chapter of Children's Advocacy Centers & Multidisciplinary Teams, *The Multidisciplinary Team/Children's Advocacy Center Model* 2 (2012) ("Since 1985, at least 750 communities across the United States have implemented investigation and treatment programs based on the Child Advocacy Center (CAC) model, [the heart of which] is the multidisciplinary team (MDT) of professionals with expertise in medicine, mental health services, child protection, law enforcement, prosecution, and victim advocacy."); Lisa M. Jones, et al., *Criminal Investigations of Child Abuse: The Research Behind "Best Practices,"* 6 Trauma, Violence & Abuse No. 3, 254, 255 (2005) ("Given the number of professionals involved in child-abuse investigations, there have been increasing efforts to coordinate investigator activities, particularly those

of law enforcement and child protective services (CPS).").

Indeed, multidisciplinary teams are *mandated by law* in a number of states and specifically endorsed by statute, although discretionary, in many more. For example, Kentucky law mandates that "[e]ach investigation of reported or suspected sexual abuse of a child shall be conducted by a specialized multidisciplinary team composed, at a minimum, of law enforcement officers and social workers from the Cabinet for Health and Family Services." Ky. Rev. Stat. § 431.600(1). Oregon law is even broader, specifying that "[t]he district attorney in each county shall be responsible for developing county multidisciplinary child-abuse teams to consist of but not be limited to law enforcement personnel, Department of Human Services child protective service workers, school officials, county health department personnel, county mental health department personnel who have experience with children and family mental health issues, child-abuse intervention center workers, if available, and juvenile department representatives, as well as others specially trained in child abuse, child sexual abuse and rape of children investigation." Or. Rev. Stat. § 418.747.

These states do not stand alone in their use of multidisciplinary teams to investigate child abuse. New York law allows a social services district to establish multidisciplinary teams that are "primarily responsible for the investigation of child abuse reports." N.Y. Soc. Serv. Law § 423(6). These multidisciplinary

teams "shall include but not be limited to representatives from the following agencies: child protective services, law enforcement, district attorney's office, physician or medical provider trained in forensic pediatrics, mental health professionals, victim advocacy personnel and, if one exists, a child advocacy center." *Id.* Multidisciplinary team members "shall participate in joint interviews and conduct investigative functions consistent with the mission of the particular agency member involved." *Id.*

Similarly, Florida law requires the formation of "multidisciplinary child protection teams" comprised of "appropriate representatives of school districts and appropriate health, mental health, social service, legal service, and law enforcement agencies." Fla. Stat. Ann. § 39.303. Idaho law requires the formation of multidisciplinary teams "for investigation of child abuse and neglect. " Idaho Code Ann. § 16-1617. These teams must consist, at a minimum, of "law enforcement personnel, department of health and welfare child protection risk assessment staff, child advocacy center staff where such staff is available in the county, a representative of the prosecuting attorney's office, and any other person deemed to be necessary due to his or her special training in child abuse investigation." *Id.* Washington law requires counties to develop protocols that address "the coordination of child sexual abuse investigations between the prosecutor's office, law enforcement, children's protective services, children's advocacy centers, where available, local advocacy groups, community sexual assault

programs and any other local agency involved in the criminal investigation of child sexual abuse." Wash. Rev. Code Ann. § 26.44.180.

Even where not formally *required* by statute, almost every state legislature endorses and encourages the multidisciplinary team approach when investigating child abuse. *See, e.g.*, Cal. Welf. & Inst. Code § 18961.7(b)(1) (specifying that a "child abuse multidisciplinary personnel team" may include psychiatrists, psychologists, marriage and family therapists, or other trained counseling personnel; police officers or other law enforcement agents; medical personnel; social services workers; and public or private school teachers and administrative officers); 325 ILCS 5/7.1 ("To the fullest extent feasible, the Department [of Children and Family Services] shall cooperate with and shall seek the cooperation and involvement of all appropriate public and private agencies, including health, education, social service and law enforcement agencies, religious institutions, courts of competent jurisdiction, and agencies, organizations, or programs providing or concerned with human services related to the prevention, identification or treatment of child abuse or neglect." Va. Code § 63.2-1507 ("All law-enforcement departments and other state and local departments, agencies, authorities and institutions shall cooperate with each child-protective services coordinator of a local department and any multi-discipline teams in the detection and prevention of child abuse."); *see also, e.g.*, Ala. Code § 26-16-51; Alaska Stat. § 47.14.300; Ariz. Rev. Stat.

§ 8-828; Ark. Code Ann. § 20-82-209; Colo. Rev. Stat. § 19-3-308; Conn. Gen. Stat. § 17a-106; Del. Code Ann. tit. 16, § 906; D.C. Code Ann. § 4-1301.51; Fla. Stat. Ann. § 39.303; Ga. Code Ann. § 19-15-2; Haw. Rev. Stat. Ann. § 588-1.5; Idaho Code Ann. § 16-1617; Ind. Code Ann. § 31-33-3-1; Iowa Code § 331.909; Kan. Stat. Ann. § 38-2228; La. Child Code Ann. art. 508; Me. Rev. Stat. Ann. tit. 22, § 4093; Md. Code Ann., Fam. Law § 5-584; Mass. Ann. Laws ch. 119 § 51D; Mich. Comp. Laws Serv. § 722.628; Minn. Stat. § 626.558; Miss. Code Ann. § 43-15-51; Mo. Rev. Stat. § 210.145; Mont. Code Ann. § 41-3-107; Neb. Rev. Stat. Ann. § 28-728; Nev. Rev. Stat. Ann. § 432B.350; N.H. Rev. Stat. Ann. § 169-C:34-a; N.J. Stat. Ann. § 9:6-8.100; N.M. Stat. Ann. § 32A-4-3; N.C. Gen. Stat. § 7B-1407; N.D. Cent. Code § 50-25.1-04.1; Ohio Rev. Code Ann. § 2151.427; Okla. Stat. tit. 10, § 7110; 23 Pa. Cons. Stat. § 6365; S.C. Code Ann. § 20-7-495; S.D. Codified Laws § 26-8A-17; Tenn. Code Ann. § 37-1-607; Tex. Fam. Code § 264.406; Utah Code Ann. § 62A-4a-409; Vt. Stat. Ann. tit. 33, § 4917; Wash. Rev. Code Ann. § 74.14B.030; W. Va. Code Ann. § 49-5D-2; Wis. Stat. § 48-981; Wyo. Stat. Ann. § 14-3-212; Guam Code Ann. § 13331; P.R. Laws Ann. tit. 8, 444c; V.I. Code Ann. tit. 5, § 2536; *cf.* 42 U.S.C. § 5106a(a)(2)(A) (providing grants to states for child abuse or neglect prevention and treatment programs for the purpose of "creating and improving the use of multidisciplinary teams and interagency, intra-agency, interstate, and intrastate protocols to enhance investigations.").

It is by design – by law enforcement officials and state legislatures – that law enforcement personnel often become involved in child-abuse cases only after the alleged victim has had extensive contact with other non-law enforcement agencies and personnel. For example, of the 26,944 reports of suspected child abuse to Pennsylvania's ChildLine and Abuse Registry for 2013, only 1,650 (6.1%) came from law enforcement agencies. *See* Pennsylvania Department of Public Welfare, Annual Child Abuse Report, 11 (2014). The remaining 25,294 reports came from schools, family members, doctors, neighbors, daycare workers, babysitters, dentists, social service agencies, and the like. *Id.*; *see also id.* at 12 ("Mandated reporters continue to be the highest reporters of suspected child abuse."). The professionals with specialized training generally operate as "first responders" with the knowledge and expectation that the evidence they gather will be used later by law enforcement officials.

Under the multidisciplinary team system, law enforcement personnel delegate interviews of abused children to child protective service workers, counselors, or other non-law enforcement personnel. *See generally* National Children's Advocacy Center, *Multidisciplinary Teams and Collaboration in Child Abuse Intervention* (2011); Alaska Children's Justice Act Task Force, *Guidelines for the Multidisciplinary Response to Child Abuse in Alaska*, 11 (Oct. 2010) ("All reasonable efforts will be made by each agency to coordinate each step of the investigation/ assessment process in order to minimize the number

of interviews and interviewers involved with the child, as well as the number of medical exams. All agencies participating in this process will share pertinent case information with other appropriate agencies except as prohibited by law or policy."). These individuals have the specialized training in dealing with children that law enforcement personnel typically lack. *See* Wendy Walsh, et al., *Children's Advocacy Centers: One Philosophy, Many Models*, APSAC Advisor, Vol. 15, No. 3 (2003) ("Forensic interviewers are trained to understand children's communications, talk with them clearly, and put them at ease, while still collecting sound investigative information.").

The delegation is purposeful. It is designed both to improve the quality of evidence gathered by the trained professionals and to minimize the number of interviews an abused child has to endure. Pennsylvania Chapter of Children's Advocacy Centers & Multidisciplinary Teams, *The Multidisciplinary Team/ Children's Advocacy Center Model* 4 (2012) ("Forensic interviews are child-centered and coordinated to avoid duplication. Using this approach, the CAC model reduces systemic trauma imposed on children by eliminating the multiple interviews typically conducted in non-CAC/MDT investigations."), *see also* Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Forming a Multidisciplinary Team to Investigate Child Abuse* 17 (2000). Typically, a single interview is conducted, and the contents of that interview are utilized by *all* members

of the multidisciplinary team to determine follow-up actions. T.P. Cross, et al., *Child forensic interviewing in Children's Advocacy Centers: Empirical data on a practice model*, 31 Child Abuse & Neglect 1031, 1033 (2007) ("Most [Children's Advocacy Centers] increase coordination by conducting multidisciplinary team interviews. In this method, one professional interviews the child while other professionals observe through a one-way mirror or closed-circuit television system. The team also shares information and decision-making, and coordinates communication with the family."). Social service staff and counselors may have the primary role for conducting interviews under the multidisciplinary team approach, but they are acting as "first responders" for law enforcement officials. *See id.*

Consequently, even though these interviews are intentionally delegated to non-law enforcement personnel, the interviews nonetheless have the primary purpose of establishing past events potentially relevant to future criminal prosecution. *See The APSAC Handbook on Child Maltreatment* 364 (John E. B. Myers, et al. eds., 2d ed. 2002) ("When [multidisciplinary teams] are employed, a single interviewer (e.g., a police officer) may question a child, having consulted first with officials from relevant agencies (e.g., social services) on important questions to ask."). Therefore, they are testimonial and subject to the Confrontation Clause. *See Bryant*, 131 S. Ct. at 1154; *see also, e.g., State v. Oliveira*, 961 A.2d 299, 311 (R.I. 2008) (holding that defendant had Sixth Amendment

right to assistance of counsel in interview with child services worker because child services worker intended to elicit incriminating information and knew she would have to turn interview notes over to police).

IV. REVERSING THE OHIO SUPREME COURT WOULD GIVE LAW ENFORCEMENT A ROADMAP TO EXEMPT CHILD-ABUSE TESTIMONY FROM CONFRONTATION.

Given the practical reality of *who* conducts most child-abuse investigations, a reversal of the Ohio Supreme Court's decision in this case risks prescribing a clear path to avoiding confrontation altogether in abuse prosecutions. States would accelerate their efforts to integrate teachers, child services workers, physicians, and other non-law enforcement personnel into the investigative machinery. The national trend to funnel child-abuse victims through social services agencies would only grow stronger; law enforcement agencies would know that the multidisciplinary teams of experts could gather all necessary statements from the child without any involvement from police or prosecutors. As a nation, we would formally indulge the fiction that the primary purpose of these interviews is not to collect evidence for use in future prosecution, but to assess imminent risks to the child's well-being. (*See* Brief for the United States as Amicus Curiae Supporting Petitioner, p. 22).

Indeed, law enforcement officials have already taken the first steps toward this end. For example,

just months after this Court's *Crawford* decision, the American Prosecutors Research Institute published an update carefully instructing law enforcement officials to use child services workers to conduct interviews in a way that would render the child's statements nontestimonial. Victor I. Vieth, *Keeping the Balance True: Admitting Child Hearsay in the Wake of* Crawford v. Washington, APRI Update, Vol. 16, No. 12 (2004). The Update instructed:

> Although the statement may also serve the purposes of the prosecutor at a criminal trial, the interview itself is not to focus exclusively or even primarily on the needs of investigators or prosecutors. States following the *CornerHouse/Finding Words* protocol for interviewing children can cite the "child first doctrine" upon which the interview is based. Moreover, forensic interviewers are specifically taught not to focus only on the possibility a child was abused by a given person. These and other safeguards distinguish forensic interviews from the "formalized testimonial materials" for criminal trials cited by the Court in *Crawford*.

Id. at 2. Five years later, another APRI Update reinforced this technique, instructing that when faced with a child's statements to sexual assault nurse examiners, social workers and forensic interviewers:

> [P]rosecutors should take the position that the non-police interviewer is not an agent of law enforcement and therefore only the reasonable expectation of the child-declarant,

> and not the primary purpose of the interrogation, is at issue. But even if the primary purpose of the interrogation is considered, it was to benefit the child, not to prejudice the defendant.

Mary E. Sawicki, *The* Crawford v. Washington *Decision – Five Years Later: Implications for Child Abuse Prosecutors*, APRI Update, Vol. 21, Nos. 9 & 10 at 7 (2009).

A reversal of the Ohio Supreme Court here would signal to law enforcement that delegation to specialized interrogators is all that is needed to subvert a core constitutional protection against wrongful convictions. *See* Rami S. Badawy, *The Supreme Court Clarifies the Primary Purpose Test*, APRI Update Express, No. 3 at 2 (March 2011) (noting that "*Bryant* provides professionals who work on cases with reluctant witnesses the framework from which they can effectively prosecute those challenging cases that revolve around the admissibility of statements from unavailable and/or reluctant witnesses."); *Leading Cases*, 120 Harv. L. Rev. 213, 217 (2006) ("Rather than resolving emergencies before conducting an investigation, police officers might be inclined to gather as much information as possible during a pending emergency in order to evade the Confrontation Clause. 911 operators, for instance, might be instructed to press callers for information about their assailants during the emergency rather than guide them to safety and then ask questions.").

Such a holding would also risk exempting a highly unreliable class of statements from the constitutionally mandated test of accuracy. This has it exactly backwards. The right to confrontation through cross-examination is *especially critical* in child-abuse cases because, as this Court has acknowledged, children are particularly susceptible to suggestion and often produce unreliable and imagined testimony. *See Kennedy v. Louisiana*, 554 U.S. 407, 444 (2008) (noting that "children are highly susceptible to suggestive questioning techniques"); *see also, e.g.*, Maggie Bruck, Stephen J. Ceci & Helene Hembrooke, *The Nature of Children's True and False Narratives*, 22 Developmental Review 520, 521 (2002) (noting that children's "reports can be greatly distorted when they are obtained under suggestive interviewing conditions."). Exposing and counteracting this effect is the very purpose of the Confrontation Clause. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 338 (2009) ("[A purpose of the Confrontation Clause] is to alleviate the danger of one-sided interrogations by adversarial government officials who might distort a witness's testimony.") (Kennedy, J., dissenting).

This Court should not sanction the erosion of constitutional rights urged by Petitioner. Reversing the decision below would dramatically and unfairly shift the balance of power in criminal trials for an entire class of cases throughout the country. Nearly *all* witnesses in abuse cases could be shielded from cross-examination at the whim of prosecutors. Child-abuse trials will soon become trials by *ex parte*

examination – precisely the evil targeted by the Confrontation Clause. *See Davis v. Washington*, 547 U.S. 813, 826 (2006) ("[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case – English or early American, state or federal – can be cited, that is it."); *see also Crawford*, 541 U.S. at 51 ("Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.").

CONCLUSION

Amicus understands the concern that child-abuse cases, like domestic violence cases, are "notoriously susceptible to intimidation or coercion of the victim" and often difficult to prosecute. *Davis*, 547 U.S. at 833. By the same token, however, convictions for child abuse carry significant punishments and social stigmas, and our criminal justice system must ensure that such convictions are correct and reliable. Cross-examination of alleged child-abuse victims is especially important to ensure the reliability of such convictions. *See Kennedy*, 554 U.S. at 444 (2008) ("Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement."). Put bluntly, this category of testimony is *more* in need

of the constitutional guarantee of reliability (confrontation), not *less*.

Accordingly, *amicus* urges this Court to affirm the decision of the Supreme Court of Ohio and to recognize the practical reality that non-law enforcement officials play a critical role in the investigation and prosecution of child-abuse cases.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1352

IN THE

Supreme Court of the United States

STATE OF OHIO

Petitioner,

v.

DARIUS CLARK

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF AMICI CURIAE NATIONAL EDUCATION ASSOCIATION, AMERICAN FEDERATION OF TEACHERS, NATIONAL SCHOOL BOARDS ASSOCIATION, AND OHIO SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*

This brief is submitted with the consent of the parties on behalf of the National Education Association (NEA), American Federation of Teachers (AFT), National School Boards Association (NSBA), and Ohio School Boards Association (OSBA) as *amici curiae* in support of the Petitioner, the State of Ohio.[1]

NEA is a nationwide employee organization with nearly three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. NEA has a strong and longstanding commitment to promoting students' safety, health, and welfare. The NEA Representative Assembly, NEA's highest governing body, has adopted numerous resolutions to increase the support provided to children who are abused or subject to violence and family instability. Of particular note, NEA Resolution C-12 supports, among other measures, "[r]equir[ing] education employees to report to appropriate authorities instances of suspected child abuse, neglect, and exploitation, while providing those employees with immunity from legal action," as well as "processes, protective options, and coping provisions for the abused, neglected, and exploited child." Additionally, in 2013, the NEA Representative Assembly adopted a

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[1] Letters of consent from all parties are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

New Business Item supporting Gabriel's law, model legislation named in memory of a child killed by his abusers despite a teacher's and others' repeated reports of the abuse, which would authorize school employees and other mandated reporters of child abuse to turn over a child suspected of being abused to proper authorities when the mandated reporter suspects the child is in imminent danger.

AFT, an affiliate of the AFL-CIO, was founded in 1916 and today represents 1.6 million members in more than 3,000 local affiliates nationwide, including pre-K through 12th-grade teachers; paraprofessionals and other school-related personnel; and early childhood educators. AFT members play a natural role in guiding and protecting our nation's children and are committed to ensuring the safety and well-being of their students. Our members also play an important role in reporting suspected child abuse of the students under their care under the nation-wide system of mandatory reporting statutes.

The NSBA, founded in 1940, is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly fifty million public school students. NSBA represents the school leaders responsible for adopting policies and procedures to promote the safety and welfare of all students. Public school districts have a strong interest in advocating for the interpretation and application of federal, state, and local laws in a

manner that allows them to meet their student safety obligations with respect for the rights of students and their families but without undue legal burdens or potential liability. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as *amicus curiae* in numerous cases.

OSBA is the largest statewide organization representing the concerns of public elementary and secondary schools leaders in Ohio. OSBA is a nonprofit 501(c)(4) corporation dedicated to assisting its members to more effectively serve the needs of students and the larger society they are preparing to enter. Nearly 100% of the 719 district boards throughout the State of Ohio are members of OSBA, whose activities include extensive informational support, advocacy, board development and training, legal information, labor relations representation, and policy service and analysis.

Amici believe that their work with teachers and other school employees give them a unique perspective on how mandatory reporting statutes operate in schools nationwide, and that their views on these issues will assist the Court in resolving this case.

INTRODUCTION AND SUMMARY

As organizations that represent millions of educators and school officials, *amici* understand the essential role of teachers and other school personnel in protecting children from abuse, neglect, and other harms, including the importance of mandatory reporting statutes that require educators in all fifty states to report suspected abuse in reinforcing those efforts. *Amici* submit this brief in support of Petitioner, the State of Ohio, to emphasize that when teachers, school administrators, and other school personnel carry out their duties as mandatory reporters of child abuse, they do not do so as agents of law enforcement or for the purpose of creating out-of-court statements for use in a prosecution. As should be obvious from both the legislative objectives of mandatory reporting laws and the in-school context in which educators work, the overwhelming purpose of an educator's inquiry about possible abuse or neglect is to protect a child, not to apprehend and prosecute the perpetrator. That being so, an educator's inquiry into possible child abuse will not normally, if ever, qualify as the kind of purposeful solicitation of out-of-court statements for use in a prosecution that triggers concerns under the Confrontation Clause.

Mandatory reporting regimes that cover educators exist in all fifty states and are supported by federal grants. Both as a matter of their histories and design, these regimes consistently reinforce the notion that reporting is required—not as means of deputizing educators, medical professionals, and others as agents of law enforcement for the

prosecution of crimes—but to ensure that those who are in the best position to identify the signs of abuse will trigger a variety of mostly *civil* investigations and interventions that help ensure the safety and well-being of children. Mandatory reporters are not charged with investigating or establishing whether, as a matter of fact, abuse has occurred; they must instead report what they reasonably suspect or believe is abuse so that other entities (such as Child Protective Services) may investigate the report. And, where suspicions of abuse are substantiated through an investigation, the official response is more likely to be the delivery of social services that prioritize family preservation, not a criminal prosecution.

Furthermore, the unique setting in which educators usually inquire about a child's injuries—which may or may not be the product of child abuse—militates against the notion that there are prosecutorial aims at work. Schools are broadly concerned with the well-being of their students, and educators will therefore inquire about a wide range of behaviors, injuries, or problems that a child presents at school. It may only become apparent after a child has responded to such an inquiry that the underlying issue is one that implicates the educator's mandatory reporting duties (as opposed to one that should be addressed through school discipline or counseling). Educators do not approach these frequent and often informal interactions with children as quasi-prosecutors eliciting out-of-court testimony, but rather as educators seeking to foster a positive school environment and to ensure the well-being of students.

The Ohio Supreme Court's decision has startlingly broad implications for the wide variety of people and professions identified as mandatory reporters, but they are particularly serious for educators and public schools. Any holding that educators are agents of law enforcement for purposes of mandatory reporting will greatly complicate efforts to train school personnel in carrying out their reporting duties, which could further weaken protection for children. Treating educators as law enforcement for purposes of the Confrontation Clause could also hamper the administration of the nation's public schools in unintended ways—for example, requiring school personnel to operate as police officers may suggest they should deliver *Miranda* warnings or procure warrants for routine school disciplinary matters.

Finally, even if statements made to teachers or school personnel might be considered "testimonial" in certain circumstances, this Court need not reach that issue because the statements at issue in this case clearly are non-testimonial under this Court's existing precedent. Given the facts presented here, the statements made to the teacher clearly indicated an emergency situation involving a child returning to a potentially dangerous environment. Furthermore, even in the absence of an emergency, both the informality of the questioning in this case and the child's intent in answering the teacher's questions confirm that the answers elicited by the teacher were not "testimony" for purposes of the Confrontation Clause.

ARGUMENT

The Ohio Supreme Court concluded that a three-year-old child's statement to his preschool teacher about how he received visible wounds was testimonial for the purposes of the Confrontation Clause. *See State v. Clark*, 999 N.E.2d 592 (Ohio 2013). Such an expansive reading of the Confrontation Clause has no basis in this Court's jurisprudence. Moreover, that holding wrongly equates the civil child protective systems adopted by all fifty states with the criminal justice system, and it misconstrues teachers' and other school employees' relationships to the children in their care. If not reversed, the Ohio Supreme Court's decision will have far-reaching effects that harm both children and educators.

A. *Clark v. Ohio* and this Court's Confrontation Clause Jurisprudence

1. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36, 50-54 (2004), this Court held that this provision, the Confrontation Clause, prohibits the admission of "testimony" of a witness who does not appear at trial, unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. However, not all out-of-court statements that might be used in a criminal trial are subject to the Confrontation Clause. Rather, only those statements that amount to "testimony"—or a

"solemn declaration or affirmation made for the purpose of establishing or proving some fact"—implicate the right to cross-examine the declarant. *Id.*; *Davis v. Washington*, 547 U.S. 813, 824-25 (2006). As relevant here, the Court has held that "prior testimony" given during "police interrogations" may be testimonial under the Confrontation Clause. *Id.* at 68.

To date, this Court has not considered "whether and when statements made to someone *other* than law enforcement personnel are 'testimonial.'" *Davis*, 547 U.S. at 823 n.2 (emphasis added). And even with law enforcement questioning, it is clear that "not all those questioned by the police are witnesses and not all interrogations by law enforcement officers are subject to the Confrontation Clause." *Michigan v. Bryant*, 131 S. Ct. 1143, 1153 (2011) (internal citation and quotation marks omitted). When such questioning is not for the "*primary purpose* of creating an out-of-court substitute for trial testimony," it falls outside the scope of the Confrontation Clause. *Id.* at 1155 (emphasis added); *see also Davis*, 547 U.S. at 822.

2. Although purporting to apply this Court's precedents, the Ohio Supreme Court adopted an expansive reading of the Confrontation Clause that would deputize millions of school employees (including teachers, counselors, and administrators), doctors, social workers, and even ordinary citizens as agents of law enforcement, and would render the Court's "primary purpose" test largely meaningless.

The Ohio court concluded that three-year-old L.P.'s out-of-court statements to his preschool teacher, identifying Clark as the source of his visible

injuries were testimonial in nature. *Clark*, 999 N.E.2d at 594. This was so, the court reasoned, because Ohio law imposes on teachers (and various other professionals) a duty to report suspected child abuse. *Id.* at 594, 596. While acknowledging that the primary purpose of that reporting obligation is protecting children, the court reasoned that because the reporting statute contemplates the possibility of prosecution for reported abuse, those subject to the reporting requirement are "agents of law enforcement" when they are questioning children about potential abuse. *Id.* at 596-97.

Having concluded that teachers function as agents of law enforcement in that circumstance, the court held that "[w]hen teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator, any statements obtained are testimonial for purposes of the Confrontation Clause." *Id.* at 597. In reaching that result the Ohio Supreme Court did not contemplate that teachers could seek to identify the perpetrator of abuse for any reason other than a prosecutorial one, such as obtaining child protective services or remedying a bullying situation; the court deemed "*any* statements" obtained with a primary purpose of identifying the perpetrators to be testimonial. *Id.* (emphasis added).

Applying these rules to the present case, the court determined that L.P.'s teachers questioned L.P. about wounds they observed on him primarily to determine who had harmed him, and not to address an ongoing emergency. The court concluded that the efforts to identify the person responsible for L.P.'s injuries "indicate a purpose to ascertain facts of

potential criminal activity" and therefore L.P.'s statements to his teachers were testimonial. *Id.* at 600. Because the three-year-old did not testify at trial, the court concluded that these statements should have been excluded under the Confrontation Clause. *Id.* at 600-01.

B. Mandatory Reporting Statutes Do Not Deputize Teachers as Agents of Law Enforcement

The Ohio Supreme Court is not the first court to consider this issue. The argument that statements to mandatory reporters of child abuse are testimonial under the Confrontation Clause has been raised in a number of cases, and both federal and state courts have consistently rejected it.[2] There are

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[2] *See United States v. Squire*, 72 M.J. 285, 289 (C.A.A.F. 2013) (a mandatory reporting "requirement, which broadly covers health care professionals, employees of public and private schools, child care providers, and providers of recreational and sports activities" is insufficient to establish that a doctor "was acting in a law enforcement capacity"); *United States v. DeLeon*, 678 F.3d 317, 325-26 (4th Cir. 2012), *rev'd on other grounds by* 133 S. Ct. 2850 (2013) (statements to social worker were non-testimonial because the social worker did not operate as an agent of law enforcement and her primary purpose was to develop a treatment plan); *United States v. Peneaux*, 432 F.3d 882, 894-96 (8th Cir. 2005) (statements to doctor were non-testimonial because the doctor's primary purpose was "ensuring [the child's] health and protection," the interview was informal, and lacked law enforcement involvement). *See also People v. Phillips*, 315 P.3d 136, 165-66 (Colo. App. 2012) (child's statements to his kindergarten teacher, teacher's aide, and acting principal about visible wounds they observed and asked him about were non-testimonial); *People v. Duhs*, 947 N.E.2d 617, 619-20 (N.Y. 2011) (reaching the same result, even

good reasons for that: a look at the reach, intent, and function of mandatory child abuse reporting laws in the broad context of child protection demonstrates that the fifty states did not intend to deputize as law enforcement all mandatory reporters of suspected abuse.

Affirming the Ohio Supreme Court's decision could have troubling and broad implications, not just for educators, but for all manner of other professionals. In all states, mandatory reporters

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though "the pediatrician may have had a secondary motive for her inquiry, namely, to fulfill her ethical and legal duty, as a mandatory reporter of child abuse"); *State v. Bella*, 220 P.3d 128, 132-33 (Or. App. 2009) (holding that the mandatory reporting "statute does not, in effect, put a police officer into the doctor's office; nor does it effectively convert the doctor into an agent or proxy of the police"); *Seely v. State*, 282 S.W.3d 778, 789 (Ark. 2008) (reaching the same result regarding statements to a social worker subject to mandatory reporting, even if she anticipated "that the information she gathered might be used in a subsequent prosecution"); *State v. Spencer*, 169 P.3d 384, 389 (Mont. 2007) ("There is no indication [] that the Legislature intended to deputize th[e] litany of professionals and individuals [who must report suspected child abuse] into law enforcement, and we refuse to attach that significance to the duty to report."); *People v. Cage*, 155 P.3d 205, 218-21 (Cal. 2007) (duty to report suspected child abuse does not transform a child's responses to a physician about his injuries into a testimonial statement); *State v. Hosty*, 944 So.2d 255, 261 (Fla. 2006) (statements a disabled adult victim made to her teacher were non-testimonial); *State v. Bobadilla*, 709 N.W.2d 243, 254-56 (Minn. 2006) (statements to child-protection worker were non-testimonial because the purpose of the child abuse investigation and reporting statute "is to protect the health and welfare of children" and the questioner's "purpose [was] assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child").

include teachers, social workers, medical professionals, and others, and in approximately eighteen states include *anyone at all* who suspects abuse.[3] Taking the Ohio reporting statute at issue in this case, under the Ohio Supreme Court's decision, all school employees; attorneys; all manner of health professionals including doctors, nurses, psychologists, marriage and family therapists, dentists, podiatrists, and massage therapists; coroners; all child care employees; all residential or child day camp employees; social workers; agents of the humane society; employees of home health agencies and entities that provide homemaker services; governmental employees associated with a wide variety of services for children and families; religious officials; and certain other professionals would be agents of law enforcement whenever they inquire into possible child abuse. *See* Ohio Rev. Code Ann. § 2151.421 (West 2014). Ohio's massage therapists, school custodians, home health employees, and others would likely be shocked to learn that they are agents of law enforcement, and that if they seek to determine who is harming a child, "any statements obtained are testimonial for purposes of the Confrontation Clause." *Clark*, 999 N.E.2d at 597.

In those eighteen states where all citizens are mandatory reporters, the Ohio Supreme Court's rationale would deem a child's own parent or

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[3] U.S. DEPT. OF HEALTH AND HUMAN SERVS., Child Welfare Information Gateway, *Mandatory Reporters of Child Abuse and Neglect: State Statutes* (2014), *available at* www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf.

guardian an agent of law enforcement. And if a mother, now an agent of law enforcement, asks questions to find out who hurt her child—if she investigates "with a primary purpose of identifying the perpetrator"—it would again be the case that "any statements obtained are testimonial for the purposes of the Confrontation Clause." *Id.* These results defy common sense. No objective evaluator would find that, solely as a result of reporting obligations, any educator, parent, or doctor who asks a child questions about injuries is serving as the functional equivalent of a law enforcement officer or is working at the behest of police investigators. Allowing the Ohio court's ruling to stand will cause such bizarre legal conclusions due to the ruling's extraordinary reach.

The ruling is also inconsistent with the purpose of mandatory reporting laws. The history of these laws makes clear they are intended to protect children from potential abuse and neglect, and generally are not intended to further criminal prosecutions. The laws are designed to handle most substantiated abuse and neglect cases civilly, with a goal of family reunification, and any criminal justice involvement is unusual. That being so, it is clear that the researchers and legislators involved in the development of the laws never sought to deputize those required to report suspected abuse and neglect as agents of law enforcement.

The ground-breaking 1962 article, *The Battered-Child Syndrome*,[4] by Dr. C. Henry Kempe and other distinguished scholars greatly increased

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[4] 181 J. AM. MED. ASS'N 17 (1962).

public attention to physical child abuse and is regarded as the direct cause and catalyst for mandatory reporting laws.[5] Among other proposals, the article (whose initial audience was medical professionals) recommended that all medical professionals report suspected child maltreatment to authorities.

The next year, after seeking input from professionals in the field, including Dr. Kempe, the U.S. Children's Bureau released a model statute that, among other provisions, required doctors and hospitals to report suspected incidences of child abuse.[6] Nearly all substantive recommendations in Dr. Kempe's influential article focus on the doctor's duty to protect the child. The only mentions of law enforcement come with the direction that a doctor "should report possible willful trauma to the police department or any special children's protective service that operates in his community" and that a doctor's training "makes it quite difficult for him to assume the role of policeman or district attorney and start questioning parents as if he were investigating a crime."[7] Even these passing glances at law enforcement are accompanied by the suggestion of a

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[5] *See* Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 838 (2010); Margaret H. Meriwether, *Child Abuse Reporting Laws: Time for A Change*, 20 FAM. L.Q. 141, 142 (1986).

[6] U.S. DEP'T OF HEALTH & HUMAN SERVS., *The Child Abuse Prevention and Treatment Act: 40 Years of Safeguarding America's Children* at 3-4 (2014).

[7] Kempe et al., *supra*, note 4 at 19, 23.

possible civil remedy—a court proceeding to effectuate temporary or permanent separation from the parents—and the repeated suggestion of treatment for parents.[8] Throughout his work, Dr. Kempe's clear focus was the safety of the child, and the possible prosecution of the abuser was not discussed. Accordingly, the approach reflected in the Children's Bureau's model reporting statute was that an agency responsible for children protection, rather than the police, should be designated as the appropriate authority for reports of abuse, and that police should be designated to receive reports "only where 'communities lacked protective services and the police were the only universally available agency to investigate such complaints.'"[9]

By 1967, Dr. Kempe's work and the grassroots efforts that grew from it led to the passage of mandatory reporting laws in all fifty states.[10] Nearly all of these state reporting schemes were based, at least in part, on the Children's Bureau's model statute.[11]

Later, Congress stepped in to reinforce state efforts to protect children from maltreatment with the Child Abuse Protection and Treatment Act of

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[8] *Id.*

[9] Monrad Paulson et al., *Child Abuse Reporting Laws—Some Legislative History*, 34 GEO. WASH. L. REV. 482, 485 (1966) (citation and quotation marks omitted).

[10] *See* Hafemeister, *supra* note 5 at 839-41.

[11] *See* Paulson et al., *supra*, note 9 at 486.

1974 (CAPTA).[12] Among other provisions, CAPTA encouraged state efforts to combat child maltreatment and increased uniformity of state laws by offering financial incentives in the form of conditional grants. States established eligibility for these grants by meeting requirements including: enacting laws for mandatory reporting of child abuse; offering legal immunity to good faith reporters; establishing a means for rapid investigation and service to children in need; requiring confidentiality; creating channels for cooperation between social service providers, police, and courts; requiring appointment of a guardian ad litem; educating the public on child maltreatment; and not reducing state funding for addressing child maltreatment below 1973 levels.[13] Tellingly, the grant funding requiring mandatory reporting laws is codified under the section entitled "Grants to States for child abuse or neglect prevention and treatment programs," 42 U.S.C. § 5106a, (2014), rather than under the section "Grants to States for programs relating to investigation and prosecution of child abuse and neglect cases," 42 U.S.C. § 5106c (2014). This legislative choice indicates that Congress intended such reporting requirements to be measures aimed at preventing abuse and protecting the child, not as prosecutorial efforts.

CAPTA's administration likewise demonstrates a child protective and not criminal focus. For

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[12] *See* Pub L, No. 93–247, 88 Stat. 4 (1974) (current version at 42 U.S.C. §§ 5101-5107) (2014).

[13] *Id.*

example, CAPTA is administered by the U.S. Department of Health & Human Services (HHS), the department responsible for children's health and welfare initiatives, rather than the Department of Justice, as would be the case for a criminal justice program. Under CAPTA as amended, HHS tracks rich, case-level data on all children nation-wide who received a child protective service (CPS) response as a result of alleged child abuse or neglect, but does not track any criminal statistics whatsoever.

The structure of mandatory reporting laws also reinforces the conclusion that they do not deputize those required to report suspected abuse and neglect as law enforcement agents. Mandatory reporting statutes are generally codified in sections of the code related to child welfare or the adjudication of civil child custody cases, not in sections devoted to law enforcement or criminal procedure.[14] Moreover, as a typical reporting statute like Ohio's requires, covered individuals must "immediately report" suspected abuse or neglect, and although the statute specifies that certain information "known or reasonably suspected or believed" should be reported, it makes no mention of any obligation to investigate or verify any information about the suspected abuse. Ohio Rev. Code Ann. § 2151.421(A)(1)(a), (C). In keeping with

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[14] *See e.g.*, N.Y. SOC. SERV. LAW § 413.1(a) (McKinney 2014); 325 ILL. COMP. STAT. ANN. 5/4 (2014); MICH. COMP. LAWS ANN. § 722.623 (West 2014); OHIO REV. CODE ANN. § 2151.421 (2014); TEX. FAM. CODE ANN. § 261.101 (West 2014); FLA. STAT. ANN. § 39.201 (West 2014).

these requirements, the state of Ohio instructs school personnel:

> Early reporting to the children services agency is encouraged to prevent injury or harm to a child. It is not [school employees'] responsibility to determine if abuse or neglect is in fact occurring or if any of the circumstances surrounding suspected incidents of abuse or neglect actually happened. Making this determination is the legally mandated function of the public children services agency.[15]

School policies and procedures typically specifically require that once a mandatory reporter suspects abuse, a report must be made to the proper authorities and no further investigation of the abuse should be conducted by anyone in the school district.[16]

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[15] OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, OFFICE OF FAMILIES AND CHILDREN, *Child Abuse and Neglect: A Reference for Educators* at 8-9 (Oct. 2013).

[16] *See, e.g., Id.* at 30-32 (model reporting procedures); Model Policy Reporting Child Abuse and Neglect for School Officials in Dupage County (IL), *available at* http://www.dupage.k12.il.us/districts/resources/pdf/ModelPolicy.pdf; Los Angeles Unified School District Child Abuse Reporting Information Sheet, *available at* http://notebook .lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/LAUSDNET/OFFICES/SCHOOL_OPS/SCHOOL_OPERATIONS_DIVISION/SCHOOL_OPERATIONS_CHILD_ABUSE_AWARENES/BULL%201347_2_CHILD%20ABUSE_ATTACHMENT%20B.PDF.

The vast majority of reports of suspected abuse or neglect are handled civilly by CPS rather than criminally, further demonstrating that mandatory reporters do not function as agents of law enforcement. According to HHS, local CPS agencies received an estimated 3.4 million reports of potential child abuse involving approximately 6.3 million children in 2012. U.S. Dep't of Health & Human Servs., CHILD MALTREATMENT: 2012 at 5 (2012). Investigation substantiates or indicates probable abuse or neglect in approximately one-fifth of these cases. *Id.* at 18. Most often, the result in these cases is to provide much needed support and resources to children and their families. And this is appropriate because most cases of child maltreatment are due to neglect, and this neglect is often the result of poverty, not deliberate indifference to the child. *See id.* at 20 (78.3% of substantiated cases involved neglect).[17] As Douglas Besharov, the first Director of the U.S. National Center on Child Abuse and Neglect, noted, "[t]he purpose of reporting is to foster the protection of children—not to punish those who maltreat them. Hence, child protective laws have no provisions for criminal court prosecution because, in most situations, criminal intent is absent." Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458, 464 (1978).

This primary emphasis on identifying maltreatment and protecting children from abuse through a variety of civil interventions is also well founded, considering the significant psychosocial and

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[17] *See also* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 131-32 (2001).

economic damages to both the child victim and to society, once maltreatment occurs:

> Child abuse and neglect have known detrimental effects on the physical, psychological, cognitive, and behavioral development of children. These consequences ... include physical injuries, brain damage, chronic low self-esteem, problems with bonding and forming relationships, developmental delays, learning disorders, and aggressive behavior. Clinical conditions associated with abuse and neglect include depression, post-traumatic stress disorder, and conduct disorders. Beyond the trauma inflicted on individual children, child maltreatment also has been linked with long-term, negative societal consequences. For example, studies associate child maltreatment with increased risk of low academic achievement, drug use, teen pregnancy, juvenile delinquency, and adult criminality. Further, these consequences cost society by expanding the need for mental health and substance abuse treatment programs, police and court interventions, correctional facilities, and public assistance programs, and by causing losses in productivity. Calculation of the total financial cost of child maltreatment must account for both the

direct costs as well as the indirect costs of its long-term consequences.[18]

Rather than seeking to prosecute all cases of suspected abuse, scholars and legislators concluded long ago that in many instances prosecution would be both inappropriate and detrimental to the interests of the child. Instead, most efforts are focused on providing interventions and supports in the interest of preserving the family. For example, Ohio's mandatory reporting statute states that it seeks to "preserve the family unit intact." Ohio Rev. Code Ann. § 2151.421 (West 2014). Indeed, among all fifty states and the District of Columbia, a 1996 General Accounting Office survey found that all but one jurisdiction had at least one family preservation program.[19] Likewise, Congress has repeatedly recognized the value of promoting family preservation and family reunification.[20]

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[18] NAT'L CLEARINGHOUSE ON CHILD ABUSE & NEGLECT INFO., *Prevention Pays: The Costs of Not Preventing Child Abuse and Neglect* (2001) (internal citations omitted).

[19] Robert Kelly, *Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy*, 34 FAM. L.Q. 359, 366 (2000) (citing U.S. Gen. Accounting Office, *Child Welfare: States' Progress in Implementing Family Preservation and Support Services* 24 (GAO/HEHE-97-94) (1997)).

[20] *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96–272, 94 Stat. 500 (1980); Omnibus Budget Reconciliation Act of 1993, Pub L. No. 103–66, 107 Stat. 312 (1993) (establishing the Family Preservation and Support Services Program); Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (1997); Promoting Safe and

The history and structure of mandatory reporting laws, along with the actual handling of child abuse reports in practice, demonstrate that these laws are designed to protect children, and that any nexus to the criminal justice system is unusual. That being so, the Ohio Supreme Court's conclusion that a responsibility to report suspected child abuse and neglect transforms millions of teachers, school administrators, and others from all walks of life into law enforcement agents cannot be sustained.

C. The Unique Setting in Which Teachers or Other School Personnel Inquire About a Child's Injuries Strongly Militates Against Finding that Such Inquiries are Made for a Prosecutorial Purpose

Even if school personnel were treated as agents of law enforcement (or if the Court were to broaden the audience to whom testimonial statements can be made), within the unique context of school settings it is clear that in virtually all situations, their inquiries into a child's injuries are non-testimonial because those inquiries are made for the primary purpose of protecting children and not primarily to advance a future prosecution that, ultimately, is unlikely to occur.

Teachers and other education professionals pay close attention to the children entrusted into their care, always monitoring their ever changing

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Stable Families Amendments of 2001, Pub. L. No. 107–133, 115 Stat. 2413 (2002); Child and Family Services Improvement Act of 2006, Pub. L. No. 109–288, 120 Stat. 1233 (2006); 42 U.S.C. §§ 629-629b (2014).

moods, dispositions, behaviors and actions so as to tailor their instruction and guidance to their students accordingly. As this Court has recognized, school authorities have an "obvious concern" with protecting the children entrusted to their care. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986); *see also Morse v. Frederick*, 551 U.S. 393, 408 (2007). Teachers' and other school officials' frequent interactions with students lead to familiarity that allows them to detect subtle changes in a child's mood, behavior, or appearance. Such changes put educators on alert that a situation may exist that demands their attention. This is especially true where the change is dramatic or negative. Teachers' and other educators' natural reaction when these situations arise is to talk with the student about what led to the change.

In a school setting, numerous factors or causes having nothing to do with abuse might prompt these kinds of inquiries. For example, a drastic mood or behavior change from a student may indicate something as minor as a tiff between friends or as serious as suicidal depression. Similarly, a change of appearance or injury can signify a variety of problems, which demand a variety of situation- and context-dependent solutions. For instance, a teacher or education support professional may notice that a student appears to have a series of scratches on his arm. While the marks could be the result of abuse, they might also be the result of bullying, nonsuicidal self-injury, rough-housing with a sibling or friend, or simply playing in some woods near the student's home. Similarly, a student who for weeks has arrived at school looking gaunt and tired could be

suffering from severe neglect at home, but she might just as easily be suffering from drug addiction, an eating disorder, depression, or another medical condition, or from disruption in the wake of her parents' divorce or job loss.

Of particular note, a student's injury, unusual mood, or behavior may relate to an altercation between students or an incidence of bullying. In recent years, in response to the Columbine shootings and other tragic events, teachers, school officials, and policy makers have paid increasing attention to the issue of peer bullying within schools. *See, e.g.*, Susan M. Swearer et al., *Bullying Prevention and Intervention: Realistic Strategies for Schools* at 53 (2009). Virtually all school employees agree that they have a responsibility to intervene when they see bullying occur. *See, e.g.*, National Education Association, *Bully Free: It Starts with Me*, "How to Identify Bullying," *available at* http://www.nea.org/home/53359.htm. In Ohio and many other states, teachers generally are required to report bullying incidents to school officials. *See, e.g.*, Ohio Rev. Code Ann. § 3313.666(B)(4) (2014). Indeed, in this very case, the Ohio Supreme Court acknowledged that the preschool teacher's initial inquiries sought to determine whether the child was harmed by another child, asking L.P. whether the person who hurt him was "big or little?" *See Clark*, 999 N.E.2d at 602. Such situations are unlikely to represent child abuse subject to a mandatory reporting obligation and are much more likely to be handled through school discipline, counseling, or parental notification.

School officials investigate children's injuries to address myriad problems, frequently including

violence *among* students rather than child abuse, so their inquiries cannot be assumed to be related to mandatory child abuse reporting obligations. Teachers' and other school officials' ability to respond to the situation and recommend appropriate remedies or coping mechanisms hinges upon their ability to freely and informally engage the student in dialogue about the challenges that student is facing. And, particularly relevant to violence among students, this Court has "recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and [has] respected the value of preserving the informality of the student-teacher relationship." *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985). This flexibility and informality are essential to the work that educators do and would be severely undermined if teachers were presumed to be investigating for the purposes of prosecution rather than for purposes of maintaining order and ensuring the safety of students.

Finally, the training teachers receive is at odds with the notion that any statement made to a teacher is intended or solicited to serve as an out-of-court substitute for live court testimony. Teachers receive extensive training both to earn their teaching credentials, and to continue to master their subject areas and new instructional and classroom management techniques as they progress as professionals. That training covers a myriad of subjects including instructional methods, curriculum content, classroom management techniques, data and assessment, techniques for reaching struggling students or those who need special education

services, cultural competence, anti-bullying, and school safety.[21] This training is intended to assist teachers in creating an environment that is safe for students, orderly, and conducive to learning. By contrast, teachers and other school personnel receive little or no training on the penal code, the elements of crimes, how to conduct a lawful search, how to preserve evidence, what sort of evidence or testimony is admissible at trial, or the roles and responsibilities of law enforcement generally. Indeed, members of this Court have recognized that "[u]nlike police officers, school authorities have no law enforcement responsibility or indeed any obligation to be familiar with the criminal laws." *T.L.O.*, 469 U.S. at 350 n.1 (J. Powell joined by J. O'Connor, concurring). Given the focus of teachers' training, the notion that a teacher's primary purpose in inquiring about a student's injury is "creating an out-of-court substitute for trial testimony," *Bryant*, 131 S.Ct. at 1155, is implausible at best.

The special responsibility of teachers to care for their students and provide for their safety is not one that educators take lightly. Preserving the

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[21] *See e.g.*, Univ. of Va. – The Curry Sch. of Educ., *Teaching Students with Unique Needs*, http://curry.virginia.edu/teacher-education/teaching-students-with-unique-needs (offering overview of Special Education curriculum); Univ. of Tex. at Austin – The College of Educ., *Early Childhood – 6th Grade Generalist*, http://www.edb.utexas.edu/education/departments/undergrad/ald/ec6gen/ (offering four-year education curriculum for primary education teachers); Stanford Univ. – Graduate Sch. of Educ., *Curriculum Outline – Secondary*, https://gse-step.stanford.edu/academics/secondary/curriculum-outline (offering overview of curriculum for secondary education teachers).

flexible and supportive relationships teachers have with their students is essential to accomplishing those goals and ensures that teachers can continue to focus on protecting and nurturing each child. Respecting those relationships is important to continue to allow teachers to reach children where they are, even when doing so requires that teachers take on roles above and beyond their duties as instructors to serve as counselors, friends, mentors, and surrogate parents to their students.

D. Treating School Personnel as Law Enforcement for Purposes of the Confrontation Clause is Likely to Have Unintended and Adverse Consequences

To hold that teachers and other school personnel operate as law enforcement when carrying out their mandatory reporter duties could also have far-reaching consequences that would undermine the welfare of students and the educational process.

1. Most importantly, such a holding will likely make it more difficult for teachers and other school personnel to carry out their duties as mandatory reporters. This would be an especially baleful result because educators are among the most likely people to detect and report abuse: for the past five years, more than sixteen percent of reports were by education professionals.[22]

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[22] *See* U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT: 2012 at 22. *See also* Maureen C. Kenney, *Child Abuse Reporting: Teachers' Perceived Deterrents*, 25 CHILD ABUSE & NEGLECT 81, 82 (2001) ("By virtue of their work, [educators] have ongoing contact with children, thus

School personnel may be uncomfortable serving as law enforcement or justifiably concerned that their actions would compromise potential criminal investigations. This could be exacerbated by the fact that many teachers already feel that they do not receive adequate training on how to carry out their duties as mandatory reporters.[23] If this Court were to impose additional law-enforcement duties on those who serve as mandatory reporters, it would be impractical to provide teachers, other school personnel, and millions of other mandatory reporters the training they would need in order to carry out their duties responsibly. As it is, effective training for mandatory reporters must cover complex topics such as recognizing and identifying various forms of abuse (including sexual abuse, physical abuse, emotional abuse, and neglect), distinguishing abuse from other injuries, as well as the proper reporting procedures for suspected abuse.[24] Adding further layers of complexity related to a reporter's duties as a supposed agent of law enforcement would only distract school personnel—who, it must be remembered, must also focus on their key objective of educating the nation's children—from their responsibility to protect children from abuse.

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placing them in a unique position to detect signs of child abuse.").

[23] *See* Krisann M. Alvarez et al., *Why are Professionals Failing to Initiate Mandated Reports of Child Maltreatment, and Are There Any Empirically Based Training Programs to Assist Professionals in the Reporting Process?*, 9 AGGRESSION & VIOLENT BEHAVIOR 563, 564-65 (2004).

[24] *See id.* at 570-72; *Child Abuse and Neglect: A Reference for Educators*, *supra* note 15, at 17-33.

2. Treating teachers as law enforcement for purposes of the Confrontation Clause could also lead to their being treated as law enforcement in other contexts that would greatly complicate the administration of the nation's public schools in unintended ways. For example, courts have uniformly held that questioning of a student by school personnel generally does not qualify as "custodial interrogation" that calls for the prophylactic warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966), unless teachers are working in concert with law enforcement to support a prosecution.[25] Yet, if this Court were to suddenly conclude that teachers and other school personnel *are* agents of law enforcement in certain circumstances, that could easily change. *See S.E.*, 544 F.3d at 640-41 (reasoning that a school official's questioning of a student did not violate *Miranda* largely because the official was not an agent of law enforcement). And, in that event, school officials would be forced to make difficult case-by-case determinations about whether responding to routine

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[25] *See S.E. v. Grant County Bd. of Educ.*, 544 F.3d 633, 641 (6th Cir. 2008); *see also C.S. v. Couch*, 843 F. Supp. 2d 894, 918 (N.D. Ind. 2011); *People v. Pankhurst*, 848 N.E.2d 628 (Ill. App. Ct. 2006); *J.D. v. Virginia*, 591 S.E.2d 721 (Va. Ct. App. 2004); *Massachusetts v. Ira I.*, 791 N.E.2d 894 (Mass. 2003); *In re V.P.*, 55 S.W.3d 25 (Tex. Ct. App. 2001); *Louisiana v. Barrett*, 683 So. 2d 331 (La. Ct. App. 1996); *Matter of Navajo County Juvenile Action No. JV91000058*, 901 P.2d 1247 (Ariz. Ct. App. 1995); *Florida v. V.C.*, 600 So. 2d 1280 (Fla. Dist. Ct. App. 1992); *In re Corey L.*, 203 Cal. App. 3d 1020 (1988); *Jefferson v. Alabama*, 449 So. 2d 1280 (Ala. Crim. App. 1984); *Boynton v. Casey*, 543 F. Supp. 995 (D. Me. 1982); *Matter of Gage*, 624 P.2d 1076 (Or. Ct. App. 1980).

school disciplinary or behavioral issues requires the delivery of *Miranda* warnings.

The same is true of the Fourth Amendment's warrant requirement as it applies to the school setting. This Court has clearly established that educators do not act as law enforcement agents in the Fourth Amendment search and seizure context. *T.L.O.*, 469 U.S. at 334. To make them law enforcement agents for purposes of the Confrontation Clause would create confusing and inconsistent constitutional standards. In *Greene v. Camreta*, 131 S. Ct. 2020 (2011), this Court vacated the Ninth Circuit's holding that a CPS caseworker's in-school interview of a student concerning suspected abuse constituted a warrantless and unreasonable "seizure" in violation of the Fourth Amendment. But, if this Court were to determine that teachers and other school personnel operate as law enforcement whenever they inquire into possible child abuse, it would be increasingly likely that the very holding vacated in *Greene* would become the law of the land. Such a result would place teachers—who have "neither the training nor the day-to-day experience in the complexities" of the Fourth Amendment and are therefore "ill-equipped to make a quick judgment" about its application, *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring)—in the impossible position of having to choose between securing the safety of their students and complying with warrant requirements they lack the training and experience to understand.

The position advocated by the Respondent threatens to further constitutionalize many of the day-to-day functions of our nation's schools. This

Court should resist the invitation "to substitute courts for school boards, or to turn the judge's chambers into the principal's office." *Morse v. Frederick*, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part).

E. The Statements at Issue are Non-testimonial even if Statements to Teachers Could be Testimonial in Other Circumstances

As a final matter, even assuming that statements made to teachers or school personnel could be testimonial in some circumstances[26] this case can be resolved on narrow grounds because the statements at issue here were non-testimonial for at least three additional reasons.

1. First, this Court has stated that when "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not

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[26] Perhaps one could imagine a scenario in which a teacher or school administrator works so closely with law enforcement so as to be considered an agent of law enforcement with the primary purpose of creating an out-of-court substitute for criminal trial testimony. This might be so, for example, if a teacher questioned a student at the behest of police officers, using questions prepared in advance by officers, with responses relayed back to the officers at a later time. *Cf. T.L.O.*, 469 U.S. at 341 n.7 (noting a distinction between searches "carried out by school authorities acting alone" and those done "in conjunction with or at the behest of law enforcement" for purposes of the Fourth Amendment). But, this Court need not address that scenario—or the broader question of whether a teacher's inquiries *ever* might produce a testimonial statement—because that issue is not presented here.

to create a record for trial and thus is not within the scope of the Clause." *Bryant*, 131 S. Ct. at 1155. To determine "whether an emergency exists and is ongoing" requires "a highly context-dependent inquiry" that may depend in part on the type of crime in question. *Id.* at 1156, 1158-59. Because child maltreatment is often a crime of secrecy, *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987), and can involve a pattern of abuse, the threat posed to a child by an abusive caretaker may create an ongoing emergency, until some form of intervention is taken. As the Court has recently acknowledged, children "have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (quotations and alterations omitted). This fact is especially true of young children.

Here, the statements at issue were made by a three-year-old child, L.P., whose bloodshot or bloodstained eye, red marks "like whips" and welts on his face, "redness around his neck," and red marks on his body left his preschool teachers "in shock." *Clark*, 999 N.E.2d at 602 (internal quotation marks omitted). Moreover, L.P. appeared bewildered and would not eat. *Id.* Although the social worker who responded to the school was unable to stop Clark from leaving with L.P., the social worker who located L.P the next day called 911 after seeing his and his sister's injuries, and they were transported to the hospital. *Id.* at 602-03.

Each indicator of an ongoing emergency that this Court highlighted in *Davis* and *Bryant* was present in this case—L.P. faced an "imminent

bona fide physical threat," his teacher needed to determine the source of the threat in order to resolve it, and her questions lacked formality. *Davis*, 547 U.S. at 827; *Bryant*, 131 S. Ct. at 1160. L.P.'s age, bewilderment, and medical condition further indicate a lack of testimonial purpose on his part. *See Bryant*, 131 S. Ct. at 1159. Where, as in this case, a child could be returning to a dangerous environment where he lacks meaningful control or the ability to escape, teachers' efforts to intervene to protect the child should be considered non-testimonial inquiries with the primary purpose of addressing an ongoing emergency.

2. Even if the emergency exception were not applied, the Court has noted that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155. Though not determinative by itself, the Court has repeatedly stressed "the importance of *informality* in an encounter" to the ultimate determination of primary purpose. *Id* at 1160. Furthermore, the Court has instructed that an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford*, 541 U.S. at 51. Providing guidance on that point, the Court has noted that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard," because "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England."

Id. at 52. Furthermore, members of this Court have indicated that the formality needed to make a statement testimonial may derive from hallmarks of formality such as a signature or certification of veracity, *see Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2721 (2011) (J. Sotomayor, concurring in part), the use of formalized testimonial materials such as a deposition or affidavit, *see Bryant*, 131 S. Ct. at 1167 (J. Thomas, concurring), or the taking of a statement while in police custody or other formalized setting, *see Davis*, 547 U.S. at 840 (J. Thomas, concurring).

Here, L.P. was merely pulled aside, as students often are, and asked a few questions. *See Ohio v. Clark*, No. 96207, 2011 WL 6780456, at * 6 (Ohio Ct. App. 2011), *rev'd*, 999 N.E.2d 592 (Ohio 2013). A short aside with one of the most trusted and familiar figures in L.P.'s life, prior to any involvement of the police or even CPS, could hardly be said to resemble formal interrogation by a police officer. L.P.'s statement further lacked hallmarks of formal testimony such as a certification of the veracity of his statement, an affidavit, or indeed any written documentation whatsoever.

Finally, in considering whether statements are testimonial, one must also look to the primary purpose of the victim, and this Court has intimated that the condition or competency of the victim is relevant to that determination.[27] *Bryant*,

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[27] Notably, English common law at the time that the Confrontation Clause was drafted reflected a willingness by courts to admit child hearsay in child abuse cases by "family members, doctors, neighbors, or others." Anthony J. Franze, *The Confrontation Clause and Originalism: Lessons from King v. Brasier*, 15 J.L. & POL'Y 495, 518-20 (2007); *see also* Tom Harbinson, *Crawford v. Washington and Davis v. Washington's*

131 S. Ct. at 1159. Specifically, the "condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one." *Id.*

Here again, L.P.'s young age reinforces the conclusion that his statements were not testimonial. That is especially true where, as in this case, the evidence indicates that the child "'seemed kind of bewildered,'" was "'[s]taring out,'" and "'almost looked uncertain.'" *Clark*, 999 N.E.2d at 595. Additionally, L.P. received no warning about the consequences of his statements, and he only engaged in a brief dialogue with his teacher, a professional with whom he speaks on a near daily basis. An objective evaluator could not conclude that a reasonable three-year-old child in L.P.'s position would have formed a testimonial purpose, or would even understand that his statements might be used at a criminal trial.

Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians Are Nontestimonial and Admissible As an Exception to the Confrontation Clause, 58 MERCER L. REV. 569, 610 (2007).

CONCLUSION

For the foregoing reasons, the judgment of the Ohio Supreme Court should be reversed.

Respectfully submitted,

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November 24, 2014

AMICUS CURIAE BRIEF

No. 13-1352

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF *AMICUS CURIAE* FERN L. NESSON AND CHARLES R. NESSON IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* FERN L. NESSON AND CHARLES R. NESSON IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE* [1]

The undersigned Charles R. Nesson, is the Weld Professor of Law at Harvard University whose specialty is Evidence and the law of juries. His interest

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or their counsel, make a monetary contribution to the preparation or submission of this brief. All counsel of record have consented to this filing through blanket consents filed with the Court.

in this case stems from the fact that Confrontation is a central feature of his subject.

The undersigned Fern L. Nesson is a criminal appellate lawyer, formerly the chief of the appellate office of the Massachusetts Defenders Committee. Her interest is in constitutional and criminal law.

ARGUMENT

This case presents an opportunity for the Supreme Court to survey the confusion its confrontation doctrine has generated and to set the doctrine right. Confrontation in its archetypal form—where a victim accuses the defendant of a crime in open court before a judge and jury—is the dramatic core of an American criminal trial. Whenever the Court has had the occasion to give weight to the Confrontation Clause, it has chosen to eviscerate the essential right of confrontation instead. What was meant to be a critical constraint upon the state, ensuring that accusations of a crime leveled against a citizen be made live in court, has instead been interpreted to permit out-of-court accusations and proof by hearsay alone. We argue in this brief that the Court should use the opportunity that this case presents to reinterpret the right of confrontation so as to align with its historical and constitutional roots.

I. *OHIO V. CLARK* PRESENTS THIS COURT WITH THE OPPORTUNITY TO INTERPRET CONFRONTATION DOCTRINE TO REQUIRE THE PROSECUTION TO CONFRONT THE DEFENDANT WITH SUFFICIENT LIVE TESTIMONY FROM PERSONAL KNOWLEDGE.

The current state of confrontation law requires judges in all of the state and federal courts to exclude from evidence any hearsay that is "testimonial." *Crawford v. Washington*, 541 U.S. 36, 36 (2004). The case currently before this court involves the admissibility of statements made by an abused child to the child's teacher, the issue being whether the fact that the teacher is a mandated reporter renders her report of his statements inadmissible because they are "testimonial." A compelling dissent in the court below pointed out the stupidity of disqualifying testimony by mandated reporters, they being the people professionally trained to look out for abused children. There is no good reason why a child abuser's conviction should turn on whether or not the child's teacher is a mandated reporter; and no good reason why the Supreme Court should be telling state judges, using the authority of the Constitution, how to rule on hearsay objections to the admissibility of evidence.

Confrontation cases fall into two categories. In one category are the cases in which the non-hearsay and circumstantial evidence against the defendant is sufficient to convict. In this category, hearsay may corroborate the prosecution's case but is not essential to it. This means that, even without the hearsay, the prosecution would survive a motion for dismissal at the close of the prosecution's case.

The second category consists of cases in which there is a hole in the prosecution's proof that it tries to fill with hearsay. Without the hearsay, the prosecution's case is legally insufficient. In this category, the hearsay, if admitted in evidence, is not merely corroborative of an otherwise sufficient case, but rather is essential to it. The admission of hearsay in such a case as a substitute for live testimony should violate the Confrontation Clause.

Focusing on this distinction immediately suggests the wisdom of rethinking confrontation doctrine to require the prosecution to confront the defendant with a solid case comprised of live personal-knowledge testimony, with hearsay evidence, if admitted, as corroborative only.

Ohio v. Clark, 999 N.E.2d 592 (Ohio 2013), *cert. granted*, 135 S.Ct. 43 (2014), is an example of a case in the first category. The prosecution's evidence in *Clark*, even without the child's hearsay as reported through the testimony of the mandated reporter, was strong enough to reach a jury. The child's mother testified that when she left the child in the defendant's care at 1 a.m. the previous morning, the child was uninjured. The mother also testified that she did not return until late the next day. The child's teacher testified that the defendant dropped the child off at school at noon on the day in question. At that time, she noticed the child's injuries. A second teacher testified that, when Clark picked up the child from school, she asked him about the injuries. Instead of responding, he grabbed the child and fled so fast that the teacher was unable to take down his license plate number. Though not perhaps a strong case, a jury could reasonably infer from this evidence both opportunity and consciousness of guilt on the part of the defendant. Given the

testimony of live witnesses with which the state confronted the defendant, the hearsay admitted against him was corroborative. Although likely important to the jury in coming to its verdict, the hearsay was not legally essential.

Treating the Confrontation Clause as a constitutional mandate to require judges in state trials to exclude such non-essential hearsay makes no sense, and gives up the true office of the clause, which is to require conviction based on live witnesses confronting the defendant from personal knowledge. The essential question is whether there is good solid evidence independent of the hearsay or whether there is not. This was issue in Raleigh's case and it remains the issue for the Court today.

II. UNDERSTANDING RALEIGH'S CASE IS NECESSARY TO UNDERSTANDING THE TRUE IMPORT OF THE CONFRONTATION CLAUSE.

The Raleigh case exemplifies the legal concept of confrontation and speaks to the most fundamental fear of a citizen vis-à-vis the state: that of false conviction. King James I allegedly disposed of Raleigh, a political enemy, by rigging a case against him for treason. Lord Coke prosecuted the case, offering "proof" of Raleigh's crime in the form of an unsworn, unsigned statement by Raleigh's friend, Lord Cobham, who was incarcerated in the Tower of London. In the statement, Cobham accused Raleigh of planning to kill the King and soliciting Cobham's participation in the scheme. Raleigh demanded that Cobham be brought to court to accuse him in person.

Coke refused to produce Cobham and instead submitted the statements of several other out-of-court

declarants, none of whom had any personal knowledge of Raleigh's actions in the alleged conspiracy. When pressed again by Raleigh to produce Cobham—or any witness who could testify from personal knowledge, Coke offered only more hearsay to corroborate Cobham's purported accusation. Coke called Dyer, the pilot of a channel-crossing boat, who testified that a passenger on the boat said: "Your King [James] shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned." Raleigh objected again: This is the saying of some wild Jesuit or beggarly Priest; but what proof is it against me? If you proceed to condemn me by bare inferences . . without witnesses you try me by the Spanish inquisition." Jardine, Criminal Trials, Vol.1 (1849) at 418, 436.

Dyer was the only witness who appeared live in court to testify against Raleigh—and his evidence was hearsay. Based solely on hearsay evidence, Raleigh was convicted and executed. The outrage engendered by Raleigh's conviction and execution motivated the subsequent enshrinement of the right of confrontation in our Bill of Rights.

In order to properly understand the confrontation concept that is Raleigh's legacy, it is necessary to identify the basis of Raleigh's objection. Raleigh was demanding that Cobham be produced live in court to testify against him. Cobham was the only person who could speak from personal knowledge as to Raleigh's part in the alleged conspiracy. Raleigh knew that Cobham had not signed and then had retracted the confession that implicated him. He was counting on his belief that Cobham would refuse to accuse him in sworn testimony in court and, instead, would disavow his statement.

Put another way, Raleigh was asserting that the prosecution must offer "proof" in the form of a live witness who testifies at trial from personal knowledge. Coke's refusal to produce Cobham meant that the *only* proof against Raleigh was hearsay. The absence of a live accuser and the substitution of hearsay left the jurors with no way to judge the truthfulness of Cobham's accusation against Raleigh and therefore no way to reach a conviction beyond a reasonable doubt. In consequence, the public was left with a verdict riven with unresolved doubt and an execution that could only be understood as injustice. This injustice lay in the failure to produce any live witness with personal knowledge to accuse him in court. It was the insufficiency in the totality of the evidence presented that rankles, not the admission of any particular hearsay statement.

The lesson of Raleigh's case is plain: a defendant should not be convicted unless the prosecution produces witnesses with personal knowledge who appear in court to testify to each element of his offense. Only the production of live witnesses can satisfy the need for confrontation. If the prosecution is permitted to substitute out-of-court statements for in-court accusations, it can manufacture them. The jury needs to see the accuser so that it can assess the truth of the accusation. Without that, there is no way for a jury to reach a verdict beyond a reasonable doubt.

Perhaps just as important, the public needs to know that the jury has had the opportunity in order to trust the verdict. With no one present or willing to swear before the defendant and the jury that Raleigh was a traitor, the public could never be convinced that his execution was fair.

It is equally important to understand what Raleigh's case was *not* about. Cross-examination, or the lack thereof, was not an issue in Raleigh's case. In Raleigh's time, there was neither a right to counsel nor a right to cross-examine witnesses. Raleigh was not asking that he be permitted to cross-examine Cobham. He was instead asserting that, without Cobham present to accuse him to his face, there was no lawful proof of his crime.

Properly understood, the injustice of Raleigh's trial could be cured only by production of a live witness at trial. It could not be cured by substituting "good" hearsay, however reliable the state might consider it to be. Even if the hearsay is in the form of a sworn affidavit or has been previously cross-examined in another forum, the use of an out-of-court statement to prove an essential element of the offense falls short of our now constitutionally-enshrined requirement that defendants be confronted with the witnesses against them. That is the protection that confrontation provides to a defendant and that is what a jury needs to warrant its verdict.

III. THE CONFRONTATION CLAUSE IS A PRODUCTION REQUIREMENT, NOT A RULE OF EVIDENCE.

The Confrontation Clause should not be understood as a "testimonial" hearsay rule. The prosecution meets its responsibility under the Confrontation Clause when it produces witnesses live in court whose testimony from personal knowledge addresses each element of the charged offense. The clause is not directed to resolving the admissibility of specific out-of-court statements. That issue is governed by hearsay law. Whether the prosecution has met its responsibility under the Confrontation Clause cannot

be resolved by admissibility decisions on specific offers of evidence. The admissibility of any particular item of evidence must be decided according to the rules of evidence. On the other hand, whether there has been sufficient confrontation must be decided instead upon review of the state's whole case. If, at the point in the trial when the state rests its direct case, the prosecution has failed to present a live witness to testify from personal knowledge on any essential element of the offense, a constitutional confrontation error has occurred. Another way of saying this is that a conviction may not rest on hearsay alone.

A. Cross-examination Is a Different Right that Works in Tandem with Confrontation.

Confrontation happens when a witness testifies on direct examination, not during cross-examination. To be sure, the defendant has a constitutional right to cross-examine the witnesses that the prosecution calls to testify against him. But that right does not derive from the Confrontation Clause. In the plain language of the clause, the defendant has the right to "*be confronted with* the witnesses against him," not the reverse.

The defendant's right to cross-examine applies to all of the witnesses called by the prosecution. It is a right independent of the Confrontation Clause. Taken together with the production requirement of confrontation, the two rights ensure that the jury will 1) hear the personal knowledge testimony of witnesses sufficient to convict the defendant, and 2) see those witnesses and all witnesses called by the prosecution tested for credibility through cross-examination. These two distinct constitutional rights enable the jury to decide the case.

To illustrate the distinction in source and reach of these two distinct rights, consider an extreme hypothetical in which the prosecution produces no witnesses whatsoever. Judicial refusal to dismiss this case would violate the defendant's right to be confronted with the witnesses against him, but there would be no violation whatsoever of a right to cross-examine because no witnesses have testified.

Consider an alternative example in which the prosecution's only evidence is hearsay reported by a witness who is cross-examined before the jury. The defendant's right of confrontation has been violated, but not his right of cross-examination. The defendant has no right to cross-examine the hearsay declarant who is not present in court.

If, in response to the defendant's confrontation objection, the prosecutor calls the hearsay declarant to the stand, then the defendant will have a constitutional right to cross-examine him, like any other witness called by the prosecution, but it is the Confrontation Clause which has done the work of bringing him in. Cross-examination is background procedure applicable to all live testimony. The right to cross-examine a witness who appears at trial does not, in and of itself, limit what that the witness may say. Whatever the witness says, he is on the stand and can be cross-examined about it. If the witness relates a statement by an out-of-court declarant, it is hearsay law that governs the admissibility of that statement, not the Confrontation Clause, and not any constitutional right of cross-examination of the absent declarant, however derived.

When hearsay is the sole proof offered on an element of the offense, there has been a failure to produce a live witness to accuse the defendant based upon personal

knowledge. This gap requires dismissal of the prosecution's case for failure to meet the confrontation requirement. It also means that the declarant of the hearsay offered in substitute for live testimony cannot be cross-examined, but this gives no reason to invent a redundant constitutional right to cross-examine unproduced out-of-court declarants. Confrontation solves the problem.

To derive the right to cross-examine from the Confrontation Clause instead of from the right to counsel invites the confusion between confrontation and hearsay that plagues the Supreme Court to this day. It perpetuates the misconception that the admission at trial of the statements of an absent declarant who has been cross-examined by the defendant at some point in the past negates the prosecution's obligation to produce that declarant live at the defendant's trial. So too, it leads to the misconception that out-of-court statements that hearsay law deems admissible as exceptions to the hearsay rule may satisfy the prosecution's obligation to produce the declarant live at the defendant's trial.

Further, it makes the present case and others like it insoluble. In child abuse, and other domestic violence cases, where the victim does not appear due to legal incompetence (or plain unwillingness) to testify, a testimonial analysis allows the admissibility of the victim's out-of-court accusations to turn on his or her intent in making them. Putting aside the difficulty of ascertaining a victim's intent and the variety of divergent rulings that result from trying to determine it, the testimonial standard results in decisions as bad as those under *Ohio v. Roberts*, 448 U.S. 56 (1980). Instead of requiring the witnesses with personal knowledge to make the case, the testimonial standard

permits the introduction of hearsay at trial to substitute for solid proof. Under the current standard, a defendant may be convicted based upon hearsay alone just as was Sir Walter Raleigh.

B. The Confrontation Clause Is Not an Evidentiary Rule of Hearsay Raised to Constitutional Level.

The Confrontation Clause does not govern a trial judge's rulings as to the admissibility of evidence as it is offered. It is a production rule, not an evidentiary rule of admissibility, and, as such, it is only at the close of the prosecution's case that the judge is able to determine whether the requirements of the clause have been met. If the prosecution has presented sufficient live witnesses who speak from personal knowledge, the defendant has been adequately confronted and the case may go to the jury. If it has not, the judge must dismiss the charge against the defendant. If the prosecution produces live witnesses sufficient to prove its charge, it fulfills its responsibility to confront the defendant quite apart from the reliability of the testimony. All credibility issues and all reasonable inferences from the witnesses' testimony are left to the jury. Reliability is not a confrontation requirement.

The defendant's confrontation objection is an assertion of the insufficiency of the prosecution's entire case. That is why it is properly made when the prosecution rests. The defendant's hearsay objections, in contrast, relate to the admissibility of specific out-of-court statements offered for their truth without opportunity to cross-examine the declarant. Evidentiary rulings on hearsay objections can and should be made as the trial progresses. Just as the judge is not deciding confrontation issues when she

rules on the admissibility of specific evidence, she is not making a hearsay ruling when she decides, at the end of the direct case, whether the prosecution has offered enough live testimony to send the case to the jury.

IV. CRAWFORD CONFUSES CONFRONTATION WITH CROSS-EXAMINATION, MISINTERPRETS THE REQUIREMENTS OF THE CONFRONTATION CLAUSE, AND PERMITS DEFENDANTS TO BE CONVICTED UPON HEARSAY ALONE. IT SHOULD BE OVERRULED.

The *Crawford* Court overruled *Ohio v. Roberts* with good reason, but it then simply conflated confrontation with hearsay in a new way. Justice Scalia, announcing the "testimonial" standard, asserted that the purpose of confrontation is to test the reliability of witnesses by cross-examination. The clause's "ultimate goal," Justice Scalia says, is to assure "testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. This transforms confrontation into a hearsay rule. But the clause speaks to the defendant's right to *be confronted with* witnesses, not to the defendant's right to test them. *Id.* at 42. Justice Scalia interprets "witnesses" in the phrase "the witnesses against" to include not only the witnesses who come to court to testify against the defendant at trial, but all out-of-court declarants who have made "testimonial" statements. *Id.* at 40. The most plausible meaning of the "witnesses against" in the Confrontation Clause is that they are those persons who appear at trial to testify against the defendant. If, after the prosecution calls its last witness, there remains a gap in its case that has not been supported by live testimony from personal knowledge, it has failed to call a required "witness

against" and the defendant has been denied his right to confrontation.

The Court should overrule *Crawford* and return to the approach of *United States v. Kirby*, 174 U.S. 47 (1899). The *Kirby* opinion, written by the first Justice Harlan, represents a better understanding of the Confrontation Clause. Kirby was tried in a federal court for receiving and converting stolen postage stamps. 174 U.S. at 48–49. As proof that the stamps were stolen, the prosecution introduced evidence that the men who sold the stamps to Kirby had pleaded guilty to stealing them in a separate proceeding. *Id.* at 49. A federal statute purported to permit the introduction of this hearsay report of the conviction of the thief as conclusive evidence that the goods were stolen in a prosecution of the receiver. *Id.* at 54.

Justice Harlan held, for the Court, that this violated Kirby's constitutional right to confrontation:

> Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution . . [That] record showing the result of the trial of the principal felons was undoubtedly evidence, as against *them*, in respect of every fact essential to show *their* guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused . *except by witnesses who confront him at the trial*

Id. at 55 (emphasis added).

Kirby defines the prosecution's responsibility under the Confrontation Clause as requiring the production

of live witnesses at trial who can testify from personal knowledge sufficient to prove the crime charged against the defendant, rather than interpreting it is a rule of evidence. *Id.* at 61. At Kirby's trial, the admission of the record of the convictions of other criminals in lieu of live testimony from a witness with personal knowledge of the theft was not a question of the admissibility of the hearsay testimony. That was permitted by the federal statute and the prosecution was entitled to use it as evidence corroborating live testimony offering proof as to the theft. Rather, it was the fact that the hearsay was the only evidence offered on the issue of theft that created a confrontation problem.

Returning to *Kirby* will right the ship. Confrontation analysis under a *Kirby* standard applies to the prosecution's case as a whole; it is a constitutional expression of one of the rights to a fair trial, assuring that no essential element of proof against an accused may be proved by hearsay alone. It is not a rule of admissibility with respect to specific kinds of hearsay statements, but rather a procedural rule of production by which the trial judge is to assess the quality and sufficiency of the prosecution's proof in total.

This interpretation of the Confrontation Clause makes not only linguistic but functional sense. It delineates the proper roles and functions of judge and jury at trial. It leaves to the judge all legal decisions on admissibility of evidence and the legal sufficiency of the prosecution's case. It leaves exclusively to the jury the determination of the credibility of the witnesses and the ultimate decision as to the defendant's guilt. Having heard live witnesses, the jury is enabled to decide beyond a reasonable doubt.

Perhaps equally important, the *Kirby* approach, in contradistinction to the testimonial standard, will separate confrontation from the "ganglia of hearsay," *California v. Green*, 399 U.S. 149, 173 (1970). It is the proper province of the law of hearsay (backed up by due process and the right to counsel) to protect the defendant's right to cross-examine an out-of-court declarant. Hearsay analysis at the time that an out-of-court statement is offered can be relied upon to weed out unreliable, un-cross-examined evidence from the jury's consideration. Confrontation analysis at the close of the prosecution's case will enforce a different requirement—the production of witnesses who testify from personal knowledge as to each element of the crime—thus ensuring that the defendant and the jury are presented with enough live evidence to support the charge.

CONCLUSION

Crawford's "testimonial" approach just does not work. Like *Roberts*, it mixes up hearsay and confrontation law. It offers no clean definition of what "testimonial" means. It permits conviction based on hearsay alone. It claims to have history on its side but that history is one of persistent misunderstanding. It leaves Raleigh convicted even without Cobham if the statement by the boat pilot is deemed not "testimonial." And in the present case, it would require that the victim's identification of the defendant, given to a mandated reporter, be excluded despite the fact that the prosecution produced live witnesses who spoke from personal knowledge on each element of the offense.

Ohio v. Clark offers the perfect vehicle for the Court to reexamine and rectify its misreading of the Confrontation Clause in *Crawford* and to clear up the

confusion created in its wake. The Court should overrule *Crawford* and affirm the defendant's conviction in the present case.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1352

In The Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF FOR THE STATE OF NEW MEXICO AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does an individual's obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?

2. Do a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

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INTEREST OF THE AMICI CURIAE

Amici Curiae State of New Mexico and the National District Attorneys Association appear in support of the State of Ohio.[1] If adopted nationwide, the Ohio Supreme Court's erroneous interpretation of the Confrontation Clause would effectively prevent the prosecution of many acts of cruelty against the Nation's children. As the State of New Mexico's chief law enforcement officer, the undersigned Attorney General has a powerful interest in ensuring that the Ohio Supreme Court's interpretation of the Confrontation Clause is rejected.

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." This case presents questions of importance to prosecutors nationwide. The

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

issues here relate to statements made by a child to a teacher concerning child abuse, and how those statements should be treated under the Confrontation Clause. All 50 states have mandatory reporting laws for teachers and many others who become aware of child abuse. How statements made by children to mandated reporters should be treated under the Confrontation Clause is a matter affecting a significant percentage of child abuse prosecutions. Your Amici have expertise in such prosecutions, and believe that additional briefing will be of assistance to the Court.

SUMMARY OF THE ARGUMENT

This brief addresses the Petition's second question. Prosecutions of child abuse frequently turn on the question whether a young child's out-of-court statements are testimonial for purposes of the Confrontation Clause. Under the Court's recent precedent, whether a statement is testimonial often depends on the purpose of the interrogation. But when the expectations of interrogator and declarant diverge radically, as they do in cases involving young children and likewise when an adult becomes the subject of an undercover investigation, the purpose of the interrogation changes depending on whose perspective is adopted, that of the interrogator or that of the declarant. In irreconcilable-purpose cases involving adult declarants, courts universally evaluate the circumstances from the perspective of the declarant.

But when the witness or victim is a young child, some courts instead adopt the perspective of the interrogator, as the Supreme Court of Ohio did below. The interrogator-centric analysis employed by the Supreme Court of Ohio is contrary to the Court's precedent, inconsistent with the Confrontation Clause's text, and illogical. It also exemplifies an unjust double standard that should be eliminated from American constitutional jurisprudence.[2]

ARGUMENT

In criminal trials since *Crawford v. Washington*, 541 U.S. 36 (2004), a critical and often decisive question is whether a given out-of-court statement is classified as "testimonial" or "non-testimonial." If hearsay is classified as testimonial, its admissibility is severely restricted when the declarant is unable to testify at trial, as for example when the declarant is a child too young and traumatized to undergo what this Court has aptly called "the ordeal of cross-examination." *Mattox v. United States*, 156 U.S. 237, 244 (1895).

The proper classification of a hearsay statement is often dependent on the perspective adopted to evaluate it. This is most true under the purpose-based

[2] Although the term "interrogator" is generally employed in the cases, outside of police-citizen encounters "listener" is often factually more accurate.

test adopted in *Davis v. Washington*, 547 U.S. 813 (2006), and developed in *Michigan v. Bryant*, 562 U.S. ___, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). When the interrogator's purpose is to gather evidence pertinent to a police investigation or criminal prosecution, but the declarant's purpose is entirely unrelated to that goal, whether the declarant's words are deemed testimonial will depend entirely on whose perspective counts.

The Ohio Supreme Court evaluated the circumstances surrounding L.P.'s statements from the teachers' perspective. It analyzed the questions, not the answers. That was backwards, for "it is the statements, and not the questions, that must be evaluated under the Sixth Amendment." *Bryant,* 131 S. Ct. at 1160 n.11. Applying the incorrect standard as it did, the court answered incorrectly the Petition's second question.

Part I begins by canvassing the various statements about perspective found in the Court's recent Confrontation Clause jurisprudence. Part II examines the Ohio Supreme Court opinion in this case, showing that its interrogator-centric analysis is based on a misreading of *Davis*. Part III then shows how some courts, including Ohio's, have established an intolerable double standard in cases involving young witnesses and victims. The brief asks the Court to direct lower courts to apply the same standards and perform the same Confrontation Clause analysis in cases involving children as they already do in cases involving adult witnesses who, like young children but for

vastly different reasons, do not understand their words will be used as evidence in a criminal trial.

I. The Treatment of Perspective in the Court's Recent Confrontation Clause Cases.

Under *Davis*, determining whether an out-of-court statement is testimonial requires identifying the "primary purpose of the interrogation." 547 U.S. at 822. In evaluating the purpose of the interrogations in *Davis* and its companion case, *Hammon v. Indiana*, the Court considered "all of the circumstances," *id.* at 828, from a variety of perspectives. Both Michelle McCottry's perspective and that of the 911 operator were explicitly considered. *Id.* at 827. In analyzing *Hammon*, the Court considered what the officers saw and heard upon first arriving, *id.* at 829-30, and then considered matters from Ms. Hammon's perspective. *Id.* at 830-32. Because its analysis considered the perspectives of both interrogator and declarant, the Court carefully employed the phrase "purpose of the interrogation" rather than "the declarant's purpose" or "the interrogator's purpose."

As developed below, the Ohio Supreme Court misinterpreted *Davis's* phrase to mean "the officer's reason for initiating the interrogation." *See Bryant*, 131 S. Ct. at 1160 n.11 (explaining the origin of that misreading). *Bryant* definitively cleared up that misunderstanding when it held that "*Davis* requires a combined inquiry that accounts for both the declarant and the interrogator." *Id.* at 1160 (footnote omitted).

The obvious logical difficulty presented by the *Davis/Bryant* formulation is that an interrogation, being an incorporeal abstraction, "does not have a purpose except for the purposes assigned to it by the participants." *Lollis v. State*, 232 S.W.3d 803, 806 n.3 (Tex. App. – Texarkana 2007). That difficulty is of little practical significance when the purposes of declarant and interrogator coincide, as they generally do when interrogations occur in formal and solemn circumstances. For example, when an interrogation occurs in court or a deposition, the interrogator's purpose is to obtain testimony and the witness's purpose is to provide it. There is no other reason for them to conduct themselves in such a stilted, formalized manner. Given this mutuality of individual purpose, the purpose of the interrogation is self-evident: to produce testimony. *Crawford*, 541 U.S. at 68 (testimony is testimonial).

A detective's formal stationhouse interview with a witness or suspect resembles in both layout and procedure an *ex parte* deposition. Whether the purpose of the stationhouse interrogation is evaluated from the perspective of the interviewer or that of the interviewee, the result will generally be the same: its purpose is to obtain or memorialize verbal evidence relevant to a criminal investigation and possible prosecution. *Id.* at 52, 68. *See also Davis*, 547 U.S. at 836-37 (Thomas, J., concurring in the judgment in part and dissenting in part).

Taking an additional step across the spectrum from formal to informal, when a police officer asks a

victim of domestic violence to draft an affidavit, and the victim complies, their purposes coincide. *Id.* at 820. Whether the drafting of the affidavit is evaluated from the perspective of the Peru, Indiana officer who provided the form to Amy Hammon, or from Ms. Hammon's perspective as she filled it out, its purpose was to generate evidence for use in the police investigation of her complaint and any possible future prosecution.

However, once police-citizen encounters move more decisively from formal to informal, and from solemn to chaotic, it becomes increasingly difficult to say that the purposes of the participants coincide. Two significant problems quickly present themselves: the participants may, and as a practical matter almost invariably will, be acting on a multiplicity of purposes; and the purposes of the interrogator and declarant may be inconsistent or even contrasting. But if the participants do not agree on the purpose of their exchange, how can a single purpose be meaningfully assigned to the exchange itself?

The Court addressed some of these difficulties in *Bryant*. The majority identified the purpose of the interrogation by considering the situation from both the officers' perspective and that of the dying man. *Id.* at 1160-61, 1162. It found a shared purpose in their response to the emergency: everyone was motivated to deal with the unfolding tragedy. *Id.* at 1162-67.

Justice Scalia argued in dissent that the situation should instead have been evaluated strictly from the speaker's perspective:

> The declarant's intent is what counts. For an out-of-court statement to qualify as testimonial, the declarant must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark; and he must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused.

Id. at 1168-69 (Scalia, J., dissenting).

Justice Ginsburg wrote separately to agree that "'[t]he declarant's intent is what counts.'" *Id.* at 1176 (Ginsburg, J., dissenting).

The *Bryant* majority agreed with the dissents in principle that "[a]t trial, the defendant's statements, not the interrogator's questions, must therefore pass the Sixth Amendment test." *Id.* at 1162. *Accord id.* at 1160 n.11 ("it is the statements, and not the questions, that must be evaluated under the Sixth Amendment"). To avoid the inherent subjectivity of an inquiry into the speaker's purpose, however, the majority directed lower courts to consider the perspective of "a reasonable victim in the circumstances of the actual victim." *Id.* at 1161. That inquiry, in turn, is part of a larger inquiry into "the purpose that reasonable participants would have had." *Id.* at 1156.

Since *Crawford,* then, members of this Court have disagreed from whose perspective the circumstances surrounding an interrogation should be evaluated. Three possibilities have found their advocates: that only the declarant's intent counts; that the perspectives of both interrogator and declarant must be considered together; and that the purposes of hypothetical reasonable participants govern.

The one approach that no justice has ever championed is the one adopted by the Ohio Supreme Court below: evaluating the declarant's statement by ignoring the declarant's perspective, considering only the purpose and expectations of the interrogator. *Cf. Bryant*, 131 S. Ct. at 1162 (rejecting that approach).

II. The Ohio Supreme Court Improperly Evaluated the Circumstances from the Perspective of the Teachers, Who Were Not the Witnesses.

The Court's post-*Crawford* cases have not previously dealt with conversations between private parties. Accordingly, the Court has not yet decided whether the *Davis/Bryant* test applies in any context outside of police-citizen encounters. The Ohio Supreme Court's designation of mandated reporters as agents of law enforcement is singularly unpersuasive for the reasons set forth in Ohio's merits brief. (Pet. Br. pt. II.) However, the admissibility of small children's disclosures to a wide variety of adults remains a contentious and active area of litigation, with courts

disagreeing about the constitutional admissibility of children's out-of-court statements to medical personnel, forensic interviewers, police officers and social workers. *See, e.g., State v. Arnold*, 933 N.E.2d 775, ¶¶ 20-28 (Ohio 2010) (noting some of the national split in authority); *id.* ¶¶ 68-69 (Pfeifer, J., dissenting) (same). Courts generally employ the *Davis/Bryant* primary purpose test to evaluate children's statements made to adults belonging to all of these classes, and even statements to family members. *See, e.g., Seely v. State*, 282 S.W.3d 778, 788 (Ark. 2008).

In accordance with Sup. Ct. R. 37.1, Amici do not duplicate Ohio's arguments, which they support. Rather, Amici's focus is on the double standard that has developed in Confrontation Clause jurisprudence around the Nation, by which many courts, and not just the Ohio Supreme Court, alter their analysis depending on the age of the hearsay declarant.

A. The Ohio Supreme Court Viewed the Circumstances of the Case Strictly from the Teachers' Perspective.

Davis and *Bryant* require a determination of "the primary purpose of the interrogation." 547 U.S. at 822. The Ohio Supreme Court rewrote that requirement in a subtle way, stating: "the United States Supreme Court's Confrontation Clause analysis requires that we ascertain the 'primary purpose' for the questioning." *State v. Clark*, 999 N.E.2d 592, ¶ 16

(Ohio 2013). The court's paraphrase is ambiguous, when viewed in isolation, because "questioning" could function either as a noun or a verb. As a noun, it is a synonym for "interrogation." As a verb, however, it describes the actions of the questioner.

The next sentence of its opinion reveals that the Ohio Supreme Court was using the word as a verb, directing inquiry into the subjective purpose of the questioner: "Here, the circumstances objectively indicate that the primary purpose *of the questions asked* of L.P. was not to deal with an existing emergency but rather to gather evidence. " 999 N.E.2d 592, ¶ 16 (italics added). The court was inquiring into the "purpose of the questions," examining the teachers' reasons for asking what they asked. Under the *Davis/Bryant* dual-perspective test, that much would have been appropriate – if it had been coupled with an even more searching inquiry into the purpose of the three-year-old's answers. *Bryant,* 131 S. Ct. at 1160-61. But the Ohio Supreme Court did not engage in the second inquiry. It looked into the subjective purpose of the teachers and then stopped. At no point did the opinion consider why the child – the actual Sixth Amendment witness – spoke. It did not analyze the substantive evidence itself, but only what prompted its creation. The court effectively deemed the child irrelevant to his own words.

Confirming that it was applying an interrogator-focused inquiry, the court held: "When teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator, any statements

obtained are testimonial for purposes of the Confrontation Clause." *Id.* ¶ 17. This passage exclusively examined the imputed primary purpose of the teachers. Subsequently the court held that "the nature and focus *of the questions asked* indicate a purpose." *Id.* ¶ 31 (italics added). The opinion did not examine the nature and focus *of the answers given*.

The court acknowledged that *Bryant* requires the statements and actions of the declarant be examined, *id.* ¶ 31, but it did not examine them. It did not engage in "a combined inquiry that accounts for both the declarant and the interrogator." *Bryant*, 131 S. Ct. at 1160 (footnote omitted). Nor, for that matter, did it apply Justice Scalia's proposed alternative test and ask whether the child "[made] the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused." *Id.* at 1169 (Scalia, J., dissenting). By viewing the circumstances solely from the teachers' perspective, it failed to examine the purpose behind the actual words that constituted the evidence against Respondent. Instead it ruled the child's words constitutionally inadmissible based on the uncommunicated knowledge of other people. That approach was illogical, contrary to this Court's precedent, and unrelated to either the text or purpose of the Confrontation Clause.

B. The Ohio Supreme Court's Interrogator-Centric Analysis Was Based on a Misreading of *Davis* that Was Cleared Up in *Bryant*.

The decision below relied heavily on the analysis found in *State v. Siler*, 876 N.E.2d 534 (Ohio 2007). In *Siler*, the court purported to find an inconsistency between *Crawford* and *Davis*. Specifically, while *Crawford* directed attention to the declarant's reasonable expectations, *Davis* supposedly directed focus elsewhere when the interrogation was conducted by police – even though *Crawford*, too, involved a police interrogation, a point the *Siler* opinion ignores. *Id.* ¶¶ 28-29.

Siler's interrogator-centric analysis was built on the fundamental misreading of *Davis* identified in *Bryant*:

> Some portions of *Davis*, however, have caused confusion about whether the inquiry prescribes examination of one participant to the exclusion of the other. *Davis*' language could be read to suggest that the relevant purpose is that of the interrogator. In contrast, footnote 1 in *Davis* explains, "it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate."

Bryant, 131 S. Ct. at 1161 n.11 (citations and one comma omitted).

The body of the *Bryant* opinion cleared up that misunderstanding, clarifying that the proper test is the "combined inquiry." *Id.* at 1160-62. *Siler* appeared in October, 2007, over three years before *Bryant*. But the opinion below, issued two and a half years after *Bryant*, all-too-faithfully followed *Siler*, persisting in its misreading of *Davis* long after that misreading ceased to be excusable.[3]

III. Some Lower Courts, Including Ohio's, Switch Between Perspectives Depending on the Age of the Speaker, Creating and Enforcing an Intolerable Double Standard.

The *Davis/Bryant* dual-perspective test produces predictable results when the participants share a mutual purpose, as they typically do when conversing in formal and solemn circumstances. But in less formal circumstances, as the purposes of the participants diverge, the test becomes increasingly difficult to apply, until we reach the situation in which the participants have completely different and irreconcilable purposes. One classic example is presented by undercover investigations. An officer working undercover, or an informant wearing a wire, obviously proceeds with the purpose of obtaining evidence. Just as obviously, the declarant – the unwitting "witness"

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[3] Exactly the same misreading can be found in, *e.g.*, *State v. Beadle*, 265 P.3d 863, ¶¶ 22-29 (Wash. 2011), another post-*Bryant* case.

of the Sixth Amendment – does not intend to provide evidence. In such situations the "purpose of the interrogation" flips to its opposite depending on whose perspective is adopted.

A second classic example is presented by the young victim or witness who for developmental reasons cannot know that his or her words might become evidence in a future criminal trial.

A. Small Children Do Not Understand What It Means to Provide Evidence and Therefore Have No Purpose to Provide It.

"A child's age is far 'more than a chronological fact.' It is a fact that 'generates commonsense conclusions about behavior and perception.' Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge." *J. D. B. v. North Carolina,* 564 U.S. ___, 131 S. Ct. 2394, 2403, 180 L. Ed. 2d 310 (2011) (citations omitted). Peer-reviewed social science research confirms what common experience tells us: young children do not understand what a criminal prosecution is, and still less that their words may constitute evidence in one. *See, e.g.,* Catherine Maunsell, et al., "What happens in court? The development of understanding of the legal system in a sample of Irish children and adults," *Irish Journal of Psychology*, 21(3-4):215-226 (2000); Anna Emilia Berti and Elisa Ugolini, "Developing

Knowledge of the Judicial System: A Domain-Specific Approach," *The Journal of Genetic Psychology* 159(2):221-236 (1998); Rhona H. Flin, et al., "Children's Knowledge of Court Proceedings," *British Journal of Psychiatry* 80(3):285-297 (1989); Karen Saywitz, "Children's Conceptions of the Legal System," *Perspectives on Children's Testimony*, 131-157 (S.J. Ceci, et al., eds., 1989); Amye Warren-Leubecker, et al., "What Do Children Know about the Legal System and When Do They Know It?," *Perspectives on Children's Testimony* 158-183 (S.J. Ceci, et al., eds., 1989).

When the facts are viewed from L.P.'s perspective, there is no possibility that he spoke with the expectation of producing evidence for use at a future criminal trial. *Crawford,* 541 U.S. at 51-52. Nor is there any possibility that he understood himself to be providing the equivalent of in-court testimony. *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 310-11 (2009); *Davis*, 547 U.S. at 823-25; *Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting). The same holds true when the facts are evaluated from the perspective of a reasonable person in L.P.'s circumstances, because those circumstances so prominently include his age. *Bryant,* 131 S. Ct. at 1161-62.

When evaluated from the declarant's perspective, in short, a young child's revelation of eyewitness knowledge about a violent crime, or disclosure of abuse, will almost never have been done for the purpose of providing evidence for use in a future legal proceeding. But most adults who hear the child's

words will realize their legal significance, and the adult's follow-up questions might sometimes aim to establish facts potentially relevant to a future prosecution, depending on the adult's professional responsibilities. In cases where the *Davis/Bryant* dual-perspective test applies, how can such irreconcilable perspectives give rise to a single "purpose of the interrogation"? Unavoidably, courts must adopt the perspective of one participant or the other.

Courts frequently encounter just such radically divergent purposes in cases involving adult declarants, too. When the declarant is an adult, courts invariably adopt the declarant's perspective.

B. In Cases Involving Unwitting Adult Witnesses, Courts Uniformly View the Exchange from the Perspective of the Declarant.

In *Davis,* this Court described "statements made unwittingly to a Government informant" as "clearly nontestimonial." 547 U.S. at 825 (paraphrasing holding of *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987)). However, the Court left it to lower courts to explain why that result was clear. They have done so by viewing such exchanges strictly from the point of view of the declarant. The most pertinent examples concern police or FBI investigations into past crimes. For example, in *United States v. Johnson*, 581 F.3d 320 (6th Cir. 2009), one prisoner recorded another's detailed description of a long-unsolved

robbery-murder. The unwitting witness, O'Reilly, implicated his co-perpetrator Johnson, against whom the recording was eventually introduced. The prisoner equipped with the recording device obviously acted with the primary purpose "to establish or prove past events potentially relevant to later criminal prosecution." *Davis,* 547 U.S. at 822. If the exchange were viewed from his perspective, it was clearly testimonial. But the Sixth Circuit adopted the opposite perspective, holding that "[b]ecause O'Reilly did not know that his statements were being recorded and because it is clear that he did not anticipate them being used in a criminal proceeding against Johnson, they are not testimonial and the Confrontation Clause does not apply." *Johnson*, 581 F.3d at 325.

Other circuits uniformly employ the same declarant-centered approach, finding an adult witness's unwitting admissions non-testimonial despite the interrogator's evidence-gathering purpose. *United States v. Dargan,* 738 F.3d 643, 651 (4th Cir. 2013); *United States v. Dale,* 614 F.3d 942, 956 (8th Cir. 2010); *United States v. Smalls,* 605 F.3d 765, 778 (10th Cir. 2010); *United States v. Watson*, 525 F.3d 583, 589 (7th Cir. 2008).

Thus in cases involving official investigations into past crimes, in which the interrogator is consciously gathering evidence but the declarant does not know it, courts analyze the declarant's statements from the declarant's perspective – so long as the declarant is an adult.

In drug cases, too, courts routinely evaluate recorded exchanges from the perspective of the declarant, not that of the undercover officer or informant who elicited the incriminating remarks. *See, e.g., United States v. Tipton*, 572 Fed.Appx. 743, 747 (11th Cir. 2014); *Brown v. Epps*, 686 F.3d 281, 288 (5th Cir. 2012). The Second Circuit applied the same declarant-focused approach in a terrorism case, evaluating surreptitiously-recorded statements strictly from the perspective of the declarant, placing no importance on the agents' evidence-gathering purpose. *United States v. Farhane*, 634 F.3d 127, 162-63 (2d Cir. 2011) (relying on then-Judge Sotomayor's opinion in *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004)). Similarly, in a pimping prosecution, a prostitute's negotiation with an undercover officer was nontestimonial because "it cannot be said that a reasonable person, placed in the escort's position at the time the audiotape was made, would have anticipated the statements would later be used for prosecutorial purposes." *Helms v. State*, 38 So.3d 182, 187 (Fla. Dist. Ct. App. 2010).

In all of these cases, and many more that could be cited to the same effect, the listener and the adult declarant had radically divergent purposes for engaging in conversation, and radically divergent expectations about the use to which the declarant's words would be put. It was not possible to identify a "purpose of the interrogation" by amalgamating such incompatible purposes and expectations. When the declarant is an adult, courts uniformly resolve the

dilemma by examining the circumstances surrounding the exchange from the perspective of the declarant, not that of the interrogator.

C. By Contrast, Many Courts, Including Ohio's, Evaluate a Child's Hearsay Statement from the Perspective of the Adult Who Heard It, Creating and Enforcing a Double Standard.

The Illinois Appellate Court once declared: "The issue presented by the admission of hearsay is constitutionally identical in a child sex abuse case and a murder case, and the response of the sixth amendment is identical in both types of cases." *People v. Garcia-Cordova*, 963 N.E.2d 355, ¶ 66 (Ill. App. Ct. 2d Dist. 2011). That might sound like nothing more than boilerplate commitment to equal justice under law, but many courts effectively hold just the opposite, and a few do so openly, such as *State v. Moreno-Garcia*, 260 P.3d 522 (Or. Ct. App. 2011), where the court declared that "in the context of a child abuse investigation, the victim's purpose in making a statement is less important than the other factors." *Id.* at 527. By openly acknowledging a double standard for cases involving children, the Oregon court was being more forthright than the many other courts that enforce the double standard without acknowledging it. The double standard consists of switching from the perspective of the speaker to that of the listener – or even sometimes adopting the

perspective of an uninvolved third party, something never found in cases involving adult declarants.

For example, in a very recent case, the Sixth Circuit held that a three-year-old child's statements to his therapist were testimonial. In so holding, the court did not consider the child's perspective. Nor, for that matter, did the court evaluate the sessions from the therapist's point of view. Rather, it considered only the perspective of a police officer who arranged the sessions, who was not even present when the statements were made. *McCarley v. Kelly,* 759 F.3d 535, 546 (6th Cir. 2014), *cert. pet. filed* (No. 14-430, Oct. 8, 2014). But, as shown above, when police arrange for a cellmate to record the conversation of an adult, the Sixth Circuit evaluates the resulting incriminating statements from the perspective of the declarant. *Johnson*, 581 F.3d at 325. Only when the declarant is a child does the Sixth Circuit ignore the declarant's perspective and evaluate the exchange from the point of view of police officers working behind the scenes.

The Iowa Supreme Court similarly ignored the speaker's perspective in a case in which a victim of sexual abuse was unavailable at trial because the defendant's brother had murdered her in retaliation for her disclosure. The state sought to introduce a video of her pre-trial disclosure. The Iowa Supreme Court ruled that "an analysis of the purpose of the statements from the declarant's perspective is unnecessary." *State v. Bentley*, 739 N.W.2d 296, 300 (Iowa 2007). Instead the court examined the circumstances

of the recorded interview from the point of view of the police officers involved in arranging for the interview, even taking into consideration the motivations of various unnamed government officials responsible for establishing the institution under whose auspices the interview took place. *Id.* at 299-300. Like the Sixth Circuit in *McCarley,* it examined the declarant's statements from every perspective but the declarant's own.

In *Bobadilla v. Carlson*, 570 F.Supp.2d 1098 (D. Minn. 2008), *aff'd*, 575 F.3d 785 (8th Cir. 2009), the district judge declared that to consider the perspective of a young child "would require carving out an exception" to *Crawford. Id.* at 1111. He seemed not to appreciate that by *refusing to* consider the child's perspective he was doing the very thing he deplored, making a special rule applicable only in child-abuse cases.

The Ohio Supreme Court's Confrontation Clause jurisprudence embodies the double standard. Its opinion in this case evaluated the declarant's statements from the listeners' perspective. But when the declarant is an adult, the court switches perspectives. *State v. Stahl*, 855 N.E.2d 834, ¶ 36 (Ohio 2006) (evaluating adult declarant's hearsay statement from the declarant's point of view).[4]

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[4] Under the analysis adopted by the Ohio Supreme Court in this case, the result in *Stahl* would have been different if the declarant had been a child, for the hearsay statement in that

(Continued on following page)

D. A Young Child's Hearsay Statements Should Be Analyzed Under the Same Standard Applied to Statements of an Unwitting Adult Witness.

A young child answering an adult's questions has no idea that she or he is providing evidence for a criminal prosecution. The child's lack of comprehension has a different basis than that of the unwitting adult witness in the scenarios described above, but the fact that both the child and the adult do not understand they are providing information for a criminal prosecution is the same. When evaluating statements made by a young child or by an unwitting adult witness, the radical asymmetry between the expectations of interrogator and declarant forces a court to choose one perspective or the other from which to view the circumstances in which the declarant spoke. The choice of perspective determines whether the hearsay will be deemed testimonial or not. But because it is the answers that must pass Sixth Amendment muster, not the questions, the only permissible option is to adopt the perspective of the person who is the "witness" described in the Sixth Amendment. If the Ohio Supreme Court had done so in this case, it would inevitably have found that the three-year-old's statements were non-testimonial because little L.P. had no more idea that he was providing evidence for use in a future criminal trial

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case was made to a nurse, a mandated reporter. Ohio Rev. Code Ann. § 2151.421(A)(1)(b).

than does a drug dealer blithely negotiating a deal with an undercover agent. There is no justification for courts adopting the perspective of the declarant when the declarant is an adult but switching to the perspective of the listener when the declarant is a child.

CONCLUSION

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1352

In the Supreme Court of the United States

OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF *AMICI CURIAE* OHIO PROSECUTING ATTORNEYS ASSOCIATION AND THE NATIONAL CHILDREN'S ALLIANCE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Ohio Prosecuting Attorneys Association ("OPAA") is a non-profit organization created to assist county prosecuting attorneys in their pursuit of truth, justice, and the promotion of public safety. OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and to serve as legal counsel to county and township authorities. In addition to its advocacy efforts, OPAA provides continuing legal education programs for prosecutors across Ohio.

The National Children's Alliance ("NCA") is a non-profit organization created to support communities in providing a coordinated investigation and comprehensive response to child victims of abuse through Children's Advocacy Centers and Multidisciplinary Teams. NCA's 776 Children's Advocacy Centers provide a multidisciplinary team response, child-friendly facilities, trained forensic interviewers, victim advocacy, and specialized medical and mental health services for children in the investigation, prosecution, and treatment of child abuse.

In this case the Ohio Supreme Court examined the Confrontation Clause in the context of statements a

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[1] Letters of blanket consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

three-year-old child made to his preschool teachers. In light of the teachers' obligation to report child abuse, the court evaluated the statements as if they had been elicited in the course of a police interrogation. Proceeding from that false premise, the court found a three-year-old child's statements to his teachers to be testimonial.

While the court's decision was unprecedented, the underlying facts are all too common. Of the more than 290,000 children who receive services through a Children's Advocacy Center each year, 39% are too young to attend kindergarten. Because such children can rarely testify, the statements they make to their daycare providers, doctors, nurses, and counselors are typically the only way their voices can be heard. It is this population, the most vulnerable in our society, whom the Ohio Supreme Court has silenced and deprived of justice.

SUMMARY OF ARGUMENT

This Court should hold that statements made between private individuals are generally nontestimonial under the Confrontation Clause. This holding is justified because out-of-court statements exchanged between private individuals do not meet this Court's threshold requirements for implicating the Confrontation Clause. Unlike statements elicited during police interrogations, statements between privates individual rarely constitute "solemn declarations" made "for the purpose of establishing or proving some fact."

The level of formality and expectation of evidential use on the part of the declarant, present in police

interrogations, is absent from most conversations between private individuals. The colloquies in this case between a three-year-old and his teachers are illustrative of this point. Neither the teachers, nor the three-year-old, could reasonably expect that the handful of questions asked about visible injuries would one day be used as substitute for in-court testimony. These informal exchanges, conducted without police involvement, bear no resemblance to the Marian examinations the Framers sought to prohibit.

Recognition by this Court that statements exchanged between private individuals are nontestimonial will have little impact on existing Confrontation Clause jurisprudence. Two categories of statements have been evaluated by this Court since Crawford: statements elicited by agents of law enforcement, and formal statements prepared for evidentiary use. The statements at issue represent a third category of statements on which this Court has repeatedly reserved judgment. The Court should now explicitly hold what it has long implied. Statements between private individuals are nontestimonial.

This holding would be consistent with the Framers' understanding of the limitations on the right of confrontation. In the decades preceding the Framing, out-of-court statements of children incompetent to testify were admitted at trial. Parents, neighbors, doctors, and midwives routinely testified to the statements. Because these children were incompetent to testify, they could hardly be thought to "bear testimony" against the accused. Moreover, Framing-era courts appreciated that if such statements were prohibited, there would be no evidence of the offense.

The Ohio Supreme Court failed to recognize the limits of the right to confrontation as it existed at the time of the Framing. In so doing, it mistakenly applied the primary purpose test this Court set forth to evaluate statements made during police interrogations. This Court has never suggested the primary purpose test should be used to evaluate statements between private individuals. Mandatory reporters of child abuse are not *de facto* police interrogators for the purpose of the Confrontation Clause. The Ohio Supreme Court erred when it concluded otherwise.

ARGUMENT

I. A child's statements to private individuals are nontestimonial under the Confrontation Clause.

The Sixth Amendment is unconcerned with a preschool child's statements to his teachers made during lunchtime and play. Such statements are not the "principal evil"[2] at which the founding fathers directed the guarantees of the Sixth Amendment. They are nontestimonial statements whose admissibility is governed not by the Confrontation Clause, but by the traditional rules regulating hearsay.

A. Out-of-court statements made to private individuals are generally nontestimonial.

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right

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[2] *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

to be confronted with the witnesses against him."[3] In *Crawford v. Washington*, this Court expounded upon the right to confrontation, explaining that it only applies to "witnesses" against the accused.[4] The word "witnesses" was defined to mean those who "bear testimony"; "testimony" was defined as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."[5]

However, this Court recognized not all out-of-court statements constitute "testimony" requiring confrontation. *Crawford* distinguished between "testimonial" statements, whose admission requires witness unavailability and a prior opportunity for cross-examination,[6] and "nontestimonial" statements, which face no constitutional bar to admission if they fall within an exception to hearsay.[7] *Crawford* did not draw clear dividing lines between "testimonial" and "nontestimonial" but "testimonial" statements were said to include at a minimum "police interrogations" and "prior testimony at a preliminary hearing, before a grand jury, or at a former trial."[8] L.P.'s statements were certainly none of these.

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[3] U.S. Const. amend. VI

[4] 541 U.S. at 51.

[5] *Id.*

[6] *Id.* at 53-54.

[7] *Id.* at 68.

[8] *Id.*

In *Davis v. Washington*, this Court further clarified that not even all statements in response to police questioning are *per se* testimonial. Statements are nontestimonial when made during "police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." [9] By contrast, statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[10]

The point was not reached, however, to decide "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'"[11] Yet, stark comparisons have been drawn in *Crawford* and its progeny between statements made to friends, family, and non-law enforcement and those formal statements made to police officers investigating a crime. In explaining how statements to law enforcement *are* testimonial, this Court has contrasted how statements to non-law enforcement officers *are not* testimonial.

This Court has observed that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual

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[9] *Davis v. Washington*, 547 U.S. 813, 822 (2006).

[10] *Id.* at 822.

[11] *Id.* at 823 n.2.

remark to an acquaintance does not."[12] Similarly, for an out-of-court statement to be testimonial the declarant "must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark" and he "must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused. *This is what distinguishes a narrative told to a friend over dinner from a statement to the police.*"[13] Especially pertinent in the instant case, this Court has provided that "[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules."[14]

Statements made to law enforcement have both the indicia of formality and likelihood of use in prosecutions that statements made to private individuals do not.[15] Referring back to the practices at which the Sixth Amendment was directed, "[i]t was this discrete category of testimonial materials ["affidavits, depositions, prior testimony, or confessions"] that was historically abused by

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[12] *Crawford*, 541 U.S. at 51.

[13] *Michigan v. Bryant*, 131 S. Ct. 1143, 1168-69 (2011) (Scalia, J. dissenting) (internal citation omitted) (emphasis added).

[14] *Giles v. California*, 554 U.S. 353, 376 (2008) (plurality opinion).

[15] Affidavits, civil depositions, and other exceptions not relevant to the case at hand may exist, even absent law enforcement involvement, as they possess the requisite "formality and solemnity" to be considered testimonial. *Bryant*, 131 S.Ct. at 1167 (Thomas, J. concurring).

prosecutors as a means of depriving criminal defendants of the benefit of the adversary process."[16] Statements to family, friends, neighbors, acquaintances, and here, preschool teachers, bear no resemblance to formal police questioning of the sort that implicates the Confrontation Clause and even less do they look like the historical abuses that the Framers sought to avoid.

1. L.P.'s statements to his teachers do not meet this Court's definition of "testimonial."

This Court has explained that testimonial statements result from "prior testimony at a preliminary hearing, before a grand jury, or at a former trial"[17] and from police interrogations that have "a primary purpose to establish or prove past events potentially relevant to later criminal prosecution" and no "ongoing emergency" exists.[18] These statements require "unavailability and prior opportunity for cross-examination"[19] to pass Sixth Amendment muster. This Court has contrasted such formal statements with

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[16] *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J. concurring in part and concurring in the judgment.

[17] *Crawford*, 541 U.S. at 68.

[18] *Davis*, 547 U.S. at 822.

[19] 541 U.S. at 68.

statements made to "an acquaintance,"[20] "a friend,"[21] or a "neighbor."[22] In each of these cases, the Court has suggested such statements are nontestimonial facing only hearsay, not constitutional, obstacles to admission.

This Court may recall the image of Sylvia Crawford who had received her *Miranda* warnings and was repeatedly interrogated by police officers. This Court understandably held that, as a nontestifying witness, Crawford's "solemn" declaration to law enforcement officers for "the purpose of establishing or proving some fact"[23] required confrontation. Now contrast the image of Sylvia Crawford in the police interrogation room to that of the three-year-old L.P. answering his teachers' questions in a daycare lunchroom and classroom. These are starkly different images.

The first questioning at issue in this case occurred while L.P. was eating lunch. Ramona Whitley, one of L.P.'s teachers, observed that his left eye appeared to be bloodshot and bloodstained. As he sat at the lunch table, Whitley asked him, "*What happened?*" L.P

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[20] *Id.* at 51.

[21] *Bryant*, 131 S. Ct. at 1168-69 (Scalia, J. dissenting).

[22] *Giles*, 554 U.S. at 376 (plurality opinion).

[23] 541 U.S. at 51.

replied "*I fell.*"[24] Whitley asked, "*How did you fall and hurt your face?*" L.P answered "*I fell down.*"[25]

The second questioning occurred in the preschool classroom. In better lighting, Whitley saw additional red marks on L.P.'s face. As L.P sat and played at a table, Whitley again asked him, "*Oh, what happened?*"[26] Whitley then requested Debra Jones, another teacher, to take a look at L.P. Upon seeing the marks, Jones said "*Whoa, what happened? Who did this? What happened to you?*"[27] L.P. said, "*Dee Dee.*" Jones, unaware of who L.P was talking about (whether adult or child) asked "*Is he big or little?*" to which L.P. answered "*Dee is big.*" [28]

These exchanges between two preschool teachers and their three-year-old charge bear no resemblance to the *ex parte* Marian examinations the Framers sought to prohibit.[29] Rather, they fall squarely within the realm of statements made to friends, family, acquaintances, or neighbors this Court has previously suggested were nontestimonial.[30] There were no solemn declarations to police officers meant to establish facts

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[24] *State v. Clark*, 999 N.E.2d 592, 594 (2013).

[25] *Id.*

[26] *Clark*, 999 N.E.2d at 602 (O'Connor, J. dissenting).

[27] *Id.* at 595, 602.

[28] *Id.* at 602.

[29] *Crawford*, 541 U.S. at 51.

[30] *Giles*, 554 U.S. at 376 (plurality opinion).

for later prosecution. There was no oath or affirmation. In fact, no law enforcement was involved before, during, or even immediately after this exchange. It was only when Jones and Whitley took L.P. to their supervisor's office and discovered additional marks on his body that the decision to make a call to the child-abuse-reporting hotline was made.[31]

L.P.'s preschool teachers were certainly not police officers, nor were they acting at the behest of police officers, during their conversations with L.P. Their questions to him were "initial inquiries" that occurred well before any law enforcement, or even a social service worker had been made aware of the situation. As this Court has noted in both *Davis* and *Bryant*, even in cases of *police* interrogation, "initial inquiries may often . produce nontestimonial statements."[32] If this is true of police interrogations, it would be absurd to conclude that initial inquiries made by private citizens would, perhaps ever, produce testimonial statements.

Moreover, there was no solemnity in the statements at issue. This is a not a case that invites debate regarding whether the out-of-court statements were unsworn or "sworn before a notary public"[33] or whether they comprise a "certificate" or a "report."[34] L.P.'s

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[31] *Clark*, 999 N.E.2d at 602.

[32] *Bryant*, 131 S. Ct. at 1166 (citing *Davis*, 547 U.S. at 832) (italics omitted).

[33] *Williams v. Illinois*, 132 S. Ct. 2221, 2260 (2012) (Thomas, J. concurring in the judgment); *id.* at 2276 (Kagan. J. dissenting).

[34] *Id.* at 2260, 2276.

statements to his teacher were "off-hand"[35] and "casual."[36] They bore no "degree of solemnity"[37] and possessed no "indicia of formality."[38] They were not statements "produced at the request of law enforcement"[39] nor were they elicited as part of an ongoing criminal investigation "accusing a targeted individual."[40] Rather the statements were derived from questions by a pair of preschool teachers who noticed a three-year-old student had marks on his face.

When parents entrust their child to a teacher, the teacher assumes certain responsibilities and obligations with respect to the child. "The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education, and it is the "primary duty of school officials and teachers" to educate and train young people as well as "to protect pupils from mistreatment by other children "[41] Whitley and Jones inquired into the source of L.P.'s injury as part of their duty as his educators and

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[35] *Crawford*, 541 U.S. at 51.

[36] *Id.*

[37] *Davis*, 547 U.S. at 836 (Thomas, J. concurring in the judgment in part and dissenting in part).

[38] *Id.* at 840.

[39] *Williams*, 132 S. Ct. at 2260 (Thomas, J. concurring in the judgment).

[40] *Id.* at 2243 (plurality opinion).

[41] *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J concurring).

caretakers. They were personally responsible for L.P.'s safety while he was in their care; they needed to determine where, where, and how the injuries occurred.

As an essential function as their roles as teachers, they needed to know if the source of L.P.'s injuries was from another child in the classroom. Did they occur at the preschool? If so, they would need to discover which child was responsible, document the injury, and form a plan to keep L.P and other children safe. Was the source from a sibling or other child at home? If so, they would need to have a conversation with the parent or caregiver who picks the child up to ensure that the parent is aware of the situation (and knows that the injury did not occur at the center). Was the source from a negligent employee or adult caregiver of the child? If so, the teachers would need to take additional steps to secure L.P.'s safety.

L.P.'s teachers acted just as they should have: as teachers and responsible adults. Their questions and L.P.'s answers were not "accusing a targeted individual of engaging in criminal conduct."[42] On the contrary, the teachers stated that L.P was new to their school and they were not familiar with who "Dee" might be.[43] So when L.P. told them that "Dee" had hurt him, the teachers didn't even know if L.P. was describing another child or an adult. This prompted their follow-up question of whether Dee was "big or little?" Whitley and Jones did what any teacher, what *any person*,

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[42] *Williams*, 132 S. Ct. at 2242.

[43] *Clark*, 999 N.E.2d at 595, 602 (O'Connor, J. dissenting).

would do upon seeing an injured three-year-old child before them. They asked what happened. L.P.'s statements were made to his teachers who, acting as teachers, not as agents of law enforcement, inquired about the source of his injuries. L.P.'s statements bore no indicia of formality or solemnity associated with this Court's prior example of testimonial statements.

2. Recognition that out-of-court statements between private parties are nontestimonial is consistent with *Crawford* and its progeny.

Despite the array of Sixth Amendment cases this Court has considered since *Crawford*, none has required a decision on "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'"[44] Should this Court hold that out-of-court statements between private parties are outside the province of the Confrontation Clause, little, if any, impact will be seen on the types of Confrontation Clause issues this Court has previously addressed.

In *Crawford* and *Hammon* this Court held statements made during police interrogation, regardless of whether the declarant was in formal

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[44] *Davis*, 547 U.S. at 823 n.2. *See also Bryant*, 131 S. Ct. at 1155 n.3 ("*Davis* explicitly reserved the question of "whether and when statements made to someone other than law enforcement are "testimonial." We have no need to decide that question in this case either . .").

police custody, were testimonial.[45] Conversely, in *Davis*, statements made by a domestic violence victim to a 911 emergency operator during an "ongoing emergency" were held to be nontestimonial.[46] In *Bryant*, statements that a mortally wounded victim made to police officers during an "ongoing emergency" were also held to be nontestimonial.[47] The rule proposed here would leave the existing analytical framework governing police interrogations unaffected; by definition, only out-of-court statements between private parties would carry a presumption that the statements are nontestimonial.

Since *Crawford*, this Court has also evaluated whether certain scientific reports prepared as evidence for trial by private parties, at the request of the police, were testimonial. In *Melendez-Diaz* this Court held statements contained in a forensic laboratory's "certificates of analysis" showing a substance to be cocaine were "quite plainly affidavits" and "testimonial statements."[48] The Court reached the same conclusion in *Bullcoming* when it examined a forensic laboratory report with a "certification" as to the defendant's blood-

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[45] *Crawford*, 541 U.S. at 38; *Davis*, 547 U.S. at 830. "[T]he primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime " and there was no "ongoing emergency."

[46] *Davis*, 547 U.S. at 817.

[47] *Bryant*, 131 S. Ct. at 1150.

[48] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009).

alcohol level.[49] Both reports "fell within the core class of testimonial statements."[50] They were out-of-court statements, prepared to be used as evidence in a criminal case, and at the request of the police. Moreover, they were solemn affirmations of facts that the state sought to prove at trial. The very reasons why such reports were deemed testimonial are the same as why statements between private parties are nontestimonial.[51] This is because statements between private parties, like those elicited from L.P., bear no similarity to formal reports generated for trial. A clear ruling from this Court that these statements are nontestimonial will strengthen and properly define this Court's previous decisions.

In addition to being consistent with *Crawford* and its progeny, such a ruling would be consistent with this Court's holding in *White v. Illinois*.[52] In *White*, the victim was a four-year-old girl who disclosed sexual abuse by her father to her babysitter, her mother, a police officer, a nurse, and a doctor. The victim's statements to each of these individuals were admitted at trial. Applying the now-rejected *Roberts* analysis,

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[49] *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011).

[50] *Id.*

[51] This Court also determined statements contained in a scientific report to be nontestimonial in *Williams v. Illinois*, 132 S. Ct. at 2242 (plurality opinion) (private laboratory report showing a DNA profile "match" to the defendant's blood could have been "introduced for its truth" with "no Confrontation Clause violation").

[52] 502 U.S. at 349-350.

the *White* Court determined that the challenged testimony did not violate the Confrontation Clause.[53]

White's holding has been described as "in tension" with *Crawford* inasmuch as *White* permitted the unconfronted "statements of a child victim to an *investigating police officer* admitted as spontaneous declarations."[54] Yet the testimony from the victim's babysitter, mother, nurse, and doctor were *not* mentioned along with the investigating police officer as potentially problematic testimonial statements in *Crawford*. Not only is it fair to infer the other witness statements are nontestimonial under *Crawford*, such a conclusion is consistent with this Court's repeated observations that out-of-court statements between private parties are generally outside the purview of the Confrontation Clause.

Recognition from this Court that out-of-court statements between private parties are regulated by the rules of evidence and generally *not* the Confrontation Clause would be consistent with this Court's previous rulings. Such a ruling would allow trial courts to evaluate each statement under the rules of evidence which are better equipped, and a more appropriate vehicle, than the Confrontation Clause to address issues of reliability.[55] Moreover, such a ruling would respect the Framers' intent that testimonial

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[53] *Id.* at 350.

[54] *Crawford*, 541 U.S. at 58 n.8 (emphasis added).

[55] 541 U.S. at 68 "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ."

statements mark both the core concern and the perimeter of the Confrontation Clause.

B. Out-of-court statements by children incompetent to testify have historically been admitted at trial through third parties.

As this Court has previously observed, we must often "turn to the historical background of the Clause to understand its meaning."[56] This Court has previously recognized two historical exceptions to the Confrontation Clause,[57] and statements by children incompetent to testify should be a third.

1. Out-of-court statements by children incompetent to testify were routinely admitted in Framing-era cases.

In the decades preceding the Framing of the Constitution, hearsay statements of child victims were routinely admitted in common-law prosecutions of rape and assault. This was true even when the child did not testify.[58] These unconfronted out-of-court statements, related to the jury by whomever the victim happened to

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[56] *Id.* at 43.

[57] *Giles*, 554 U.S. at 362 (plurality opinion); *Reynolds v. United States*, 98 U.S. 145, 148 (1879).

[58] *See e.g., Trial of William Nichols*, Old Bailey Session Papers (hereinafter "OBSP"), t17240226-73, (Feb. 1724); *Trial of Thomas Padget*, OBSP, t17270222-72, (Feb. 1727); *Trial of Samuel Street*, OBSP, t17251013-66, (Oct. 1725); *Trial of Francis Moulcer*, OBSP, t17441017-25, (Oct. 1744); *Trial of William Tankling*, OBSP, t17500711-25, (July 1750).

tell, were often the only evidence of what transpired. An early example of this can be seen at the trial of William Kirk.[59]

In 1754, Kirk was indicted for raping seven-year-old Anne Brown. At the time of the trial it was noted that because of her age, and her "not understanding the nature of an oath," she could not be questioned at trial. In lieu of her testimony, her out-of-court statements describing the defendant's conduct were related through several third parties.[60]

At trial, a Mr. Stevenson was permitted to testify that the victim told him the accused "used to set her upon his knee, and used to put his finger into her." Similarly, an acquaintance of the victim was permitted to testify that her children told her the accused would "put his hand up their petticoats, and that some of them were sore." She was further permitted to testify that "they also told me that Anne Brown was one of those he served so." Finally, she testified that Anne "told me he had done to her as mentioned by the last evidence." Anne's mother was also permitted to testify that "the child told me he used to put his hands up her petticoats."

The Court took no exception to multiple witnesses testifying to the child's out-of-court statements. However, given that "there was no other evidence against the prisoner than hearsay from the child's mouth" Kirk was acquitted of the capital offense of

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[59] *Trial of William Kirk*, OBSP, t17540530-36, (May 1754).

[60] *Id.*

rape. Despite the acquittal, the court's ruling recognized that Anne's unconfronted hearsay statements were *evidence*. This inference is borne out by the court's decision to detain Kirk, based upon the hearsay evidence, for trial on the lesser offense of assault with intent to commit rape. While hearsay statements alone may have been sufficient to put Kirk to death, those same statements were evidently sufficient to deprive him of his liberty.[61]

Far from an anomaly, *Kirk* is representative of a common theme throughout Framing-era cases involving child victims. Their statements were routinely admitted at trial despite their inability to testify.[62] Looking solely at rape cases recorded in the Old Bailey Session Papers between 1684 and 1789, one can find nearly two dozen Framing-era cases in which unconfronted out-of-court statements, made by children too young to testify, were admitted as evidence at trial.[63] While this evidence alone was rarely sufficient

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[61] Rape, as defined at the time, required vaginal intercourse and emission. Anne's out-of-court statements did not mention emission. *See* Matthew Hale, *Historia Placitorum Coronae* 628 (Sollom Emlyn ed., London 1736).

[62] *Trial of Thomas Crosby*, OBSP, t17571207-14, (Dec. 1757); Trial of Aaron Davids, OBSP, t17591205-25, (Dec. 1759); *Trial of Samuel Tibbel*, OBSP, t17651016-2, (Oct. 1765); *Trial of Charles Brown*, OBSP, t17670603-52, (June 1767); *Trial of Isaac Spicer*, OBSP, t17671209-64, (Dec. 1767); *Trial of William Allam*, OBSP, t17680907-40, (Sept. 1768); *Trial of James Craige*, OBSP, t17710703-33, (July 1771); *Trial of Joseph Fyson*, OBSP, t17880625-93, (June 1788).

[63] For a summary of the statements admitted, see Thomas D. Lyon and Raymond LaMagna, *The History of Children's Hearsay: From*

to convict the accused of a capital offense, it often carried sufficient weight to support lesser charges.[64]

Admission of such statements, closer to the time of the Framing, can be seen in the trial of Charles Ketteridge. On July 24, 1779 Ketteridge was indicted for the rape of four-year-old Sarah Roultney.[65] When the trial was held, Sarah was "setup to be examined, but no answer could be got from her to any questions put to her." Upon her failure to testify, her mother was sworn and testified to a number of the statements Sarah would have presumably related to the jury. Her mother also testified that after having Sarah's injuries examined she and a Sir John Fielding went "with warrant" to confront the accused.

After describing an emotional exchange she had with the accused, Sarah's mother was permitted to testify to Sir John Fielding's questioning of her daughter. She recalled,

> Sir John: "my dear, tell me who hurt you"
>
> Sarah: "Mr. Wright's coachman."
>
> Sir John: "where was it in the garret or the kitchen"

Old Bailey to Post-Davis, 82 Ind. L.J. 1029, 1042 (2007), Table 2, "Hearsay admitted in Old Bailey child rape cases in which the victim did not testify (sworn or unsworn), 1684-1789."

[64] While admissible, a child's out-of-court statements were rarely sufficient to sustain convictions. Rather, after their acquittal, defendants were tried on lesser offenses. *Id.* at 1046.

[65] *Trial of Charles Ketteridge*, OBSP, t17790915-18, (Sept. 1779).

Sarah: "neither, it was in the stable"

Sir John: "where did he lay you?"

Sarah: "On the hay."

Sir John: "point out the man"

Sarah's mother testified that the encounter ended when Sarah "pointed out the prisoner." Once Sarah identified the accused, "Sir John committed him." After testifying to this colloquy between her daughter and the "investigating officer," she was permitted to testify to a number of other statements her daughter made about the accused.[66]

As in *Kirk*, the victim's mother in *Ketteridge* was permitted to testify in her stead as Sarah was incompetent to take the oath herself. However, it cannot be overlooked that she was also permitted to relate Sarah's statements to Sir John to the jury. The exchange between Sarah and Sir John, who confronted the accused "with warrant" and ultimately "committed him," bears a striking resemblance to a modern day police investigation. This strongly suggests that regardless of the formality in which it is made, children's statements will never be testimonial when they are incompetent to testify.

The prevalence of hearsay in child rape cases was recognized by commentators in the treatises of the era. In his 1769 *Commentaries on the Laws of England*, William Blackstone observed that "the law allows what the child told her mother, or other relations, to be given

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[66] *Id.*

in evidence, since the nature of the case admits frequently of no better proof."[67] In his *Historia Placitorum Coronae*, published in 1736, Matthew Hale wrote that "if the child complain presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken . "[68] This necessity of admitting hearsay testimony in cases with child victims was also recognized by Henry Bathurst in his 1761 *Theory of Evidence*.[69]

This necessity existed--and still exists--for two reasons. First, some child victims are simply unable to testify. They may not understand the nature of the oath, or they may simply sit silent when they attempt to "bear witness." Second, as Hale observed in describing child rape, "[t]he nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed "[70] Hale's remarks are as true today as they were in the eighteenth century; in most cases, the only first-hand account of what transpired is the statement of the child. While other evidence may corroborate the statement, it can seldom supplant it.

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[67] William Blackstone, *Commentaries on the Laws of England* 214 (Oxford 1769).

[68] Hale, *supra* note 61, at 634.

[69] Henry Bathurst, *The Theory of Evidence* 110 (Dublin 1761) ("In cases of foul facts done in secret, where the party is injured the repelling of their evidence is, in some measure, denying them the protection of law.")

[70] Hale, *supra* note 61, at 634.

2. Framing-era developments involving child competency and hearsay did not render statements made by children incompetent to testify testimonial.

While recognizing the difficulties involved with prosecuting sexual assaults against children, Hale and others remained concerned with *reliability* of the second-hand relation of the child's out-of-court statements.[71] Hale opined "there is much more reason for the court to hear the relation of the child herself, than to receive it at second-hand from those, that swear they heard her say so; for such a relation may be falsified, or otherwise represented at the second-hand, than when it was first delivered."[72] This concern was later echoed by Henry Bathurst.[73]

In an effort to reduce the reliance on third-party relation of children's out-of-court statements, both Hale and Bathurst suggested that children be permitted to offer unsworn testimony at trial.[74] Numerous cases can be found where courts followed Hale's suggestion and allowed a child victim to testify unsworn. In 1720, a

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[71] Despite the relative recency of the Marian abuses to defendants of this era, admission of the out-of-court statements of children was challenged, if at all, only on the grounds the statements were related second-hand. *See Trial of Joseph Pearson*, OBSP, t17321206-69, (Dec. 1732); *Trial of John Grimes*, OBSP, t17540530-1, (May 1754).

[72] Hale, *supra* note 61, at 635.

[73] Bathurst, *supra* note 69, at 110.

[74] *See* Hale, *supra* note 61, at 634-35; Bathurst, *supra* note 69, at 109-10.

ten-year-old girl was questioned regarding her understanding of the oath; when she stated she did not understand, she was permitted to testify unsworn.[75] In 1762, a five-year-old child was "examined not sworn" when she testified to the details of her rape.[76] In 1766, a ten-year-old child was also permitted to testify "not upon oath."[77]

In addition to allowing young children to testify unsworn, Hale further suggested that courts eliminate the irrebuttable presumption that children under the age of twelve were incompetent to take the oath and give sworn testimony. He wrote that if it appears to the court the victim "hath that sense and understanding that she knows and considers the obligation of an oath, tho she be under twelve years, she may be sworn."[78] Although at odds with the leading decision on child competency of the era, Hale's comments proved influential.[79]

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[75] *Trial of Thomas Beesley*, OBSP, t17200427-38, (April 1720).

[76] *Trial of Richard Smith*, OBSP, t17620421-11, (April 1776).

[77] Trial of Edward Brophy, OBSP, t17660903-38, (Sept. 1766).

[78] *See* Hale, *supra* note 61, at 634.

[79] Hale's proposed modifications to the rules governing child competency were at odds with the prevailing common-law tradition that witnesses under a certain age could never be competent to testify. Witnesses under twelve were historically incompetent to swear an oath; that age was reduced to nine at a later date. *See* Hale, *supra* note 61, at 634 and *Rex v. Travers*, 93 Eng. Rep. 793 (1726).

This inconsistency in whether children could be permitted to offer statements in court, attributable at least in part to the influence of Hale and Bathurst, was ultimately addressed in the now oft-quoted *Brasier* decision.[80] The most widely cited version of *Brasier* involved the sexual assault of seven-year-old Mary Harris and the statements she made to her mother and a woman who lodged with them. Mary's mother and the lodger were permitted to testify as to what was told to them "immediately on her coming home." Based upon this testimony, and the "hurt" she had received, Brasier was convicted.

Upon his conviction, the judgment was respited and submitted to the Twelve Judges at Serjeants'-Inn Hall in 1779 to review whether the "evidence was sufficient in point of law." Upon this review the Twelve Judges held:

> "[N]o testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence."[81]

This reporting of *Brasier* indicates Mary was neither sworn as a witness nor examined by the court and

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[80] *Davis*, 547 U.S. at 828.

[81] *Rex v. Brasier*, 168 Eng. Rep. 202 (1779).

determined to be incompetent to take the oath. In light of these facts, "the information which the infant had given to her mother and the other witness, ought not to have been received."[82]

Brasier was presumably an important case in its day as it answered several questions English courts had struggled with in the preceding century. First, it unequivocally adopted Hale's position that the irrebuttable presumption of child incompetency should be abandoned in favor of an individualized examination of each child. Second, it rejected Hale's suggestion that children too young to comprehend the oath should be allowed to testify as witnesses unsworn.[83] Finally, it suggested that the uncorroborated hearsay statements of a child were not "sufficient in point of law" to convict a defendant of misdemeanor assault charges.[84] While each of these developments in English Common Law is intriguing, none is particularly relevant to a Sixth Amendment analysis.

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[82] *Id.*

[83] *Id.* " if they are found incompetent to take an oath, their testimony cannot be received."

[84] *Id.* As discussed *supra*. When the uncorroborated hearsay statements of a child were insufficient to sustain a conviction for the capital offense of rape, defendants were often held and convicted on charges such as "assault with an intent to rape." *See* e.g., *Trial of William Nichols* (Feb. 1724); *Trial of William Tankling* (July 1750); *Trial of Samuel Street*, (Oct. 1725).

By some accounts, *Brasier* also addressed issues relating to hearsay.[85] However, the published accounts of *Brasier* differed dramatically in this area. The reported versions of *Brasier* in 1789, 1792, and 1800 each reported that Mary testified unsworn; moreover, the 1789 and 1792 versions did not mention any testimony by the mother or lodger at all.[86] If the published versions of *Brasier* available before, during and after the Framing of the Sixth Amendment made no reference to hearsay, much less a common-law right to confront one's accuser, any relevance this case has to understanding the Confrontation Clause seems speculative at best.[87]

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[85] William Blackstone, *Commentaries on the Laws of England* 214 (9th ed., London 1783) ("[I]t is now settled that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath. " This interpretation was eventually echoed by nineteenth century legal theorists and courts. *See also* Edward Hyde East, *A Treatise of the Pleas of the Crown* 443-44 (London 1803).

[86] *King v. Brasier*, 1 Leach 182-183 (K.B. rev. ed 1792), *King v. Brasier*, 1 Leach 346 (K.B. 1789 ed.); *King v. Brasier*, 1 Leach 237 (K.B. rev. ed 1800); S.M. Phillipps, *A Treatise on the Law of Evidence* 202 (New York, Gould, Banks & Gould 1816).

[87] For a thorough discussion of *Brasier* in its historical context see Anthony J. Franze, *The Confrontation Clause and Originalism: Lessons from* King v. Brasier, 15 J.L. & Pol'y 495, 499 (2007) ("When read in context, Brasier is not about confrontation at all. Rather, the case concerns unique Framing-era law governing the competency of children to take the oath and give sworn—or sworn—testimony at trial").

A review of Framing-era case law and secondary sources supports but one conclusion: out-of-court statements made by children found incompetent to testify are *not* testimonial.[88] While this conclusion may be at odds with twentieth-century Confrontation Clause jurisprudence that focused on the reliability of such statements,[89] it follows logically from the concept of "witness" itself. As this Court has previously explained, "witnesses" are those who "bear testimony" against the accused.[90] It would be illogical to conclude that one who *cannot testify* by virtue of their age and capacity *bears testimony*. If testimony is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact,"[91] how can an out-of-court statement, made by a child who lacks the capacity to make a solemn declaration in court, constitute a solemn declaration?[92]

This conclusion is consistent with Framing-era cases in which out-of-court statements of children too young to testify were excluded, if at all, only by the

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[88] Simply because a child's statements are not testimonial *does not necessarily make them admissible*. Their admissibility will ultimately be governed by applicable hearsay rules which, in part, focus on the reliability of the statements. *Davis*, 547 U.S. at 821.

[89] *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

[90] *Crawford*, 541 U.S. at 51 (internal citation omitted).

[91] *Id.*

[92] "But a person who cannot perceive his own purposes certainly cannot perceive why a listener might be interested in what he has to say." *Bryant*, 131 S. Ct. at 1169 (Scalia, J. dissenting).

rules governing hearsay.[93] Further, it reflects the developing trend at the time of the Framing that when a child is determined competent to testify, the child should testify.[94] Once a child is of sufficient capacity to appreciate the importance of an oath and attest to a "solemn declaration or affirmation" his statements can potentially be determined to be testimonial. However, unless and until that occurs, the "levity and want of experience" Bathurst observed[95] in children dictate that statements they make lay outside the province of the Confrontation Clause.[96]

This conclusion is also consistent with this Court's initial understanding of the Confrontation Clause.[97] In *Mattox* this Court observed "the primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases ..."[98] Receiving the statements of a child who lacks the basic capacity to even execute a deposition or affidavit seems far amiss from the evils the Confrontation Clause was adopted to address.

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[93] *See supra* notes 58, 62.

[94] Hale, *supra* note 60, at 634-35; Bathurst, *supra* note 68, at 110; *Trial of Joseph Fyson*, OBSP, t17880625-93, (June 1788).

[95] Bathurst, *supra* note 69, at 110.

[96] *Davis*, 547 U.S. at 824 ("A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter.").

[97] *Mattox v. United States*, 156 U.S. 237 (1895).

[98] *Id.* at 242.

Moreover, the *Mattox* Court recognized "general rules of law," like the Confrontation Clause, "however beneficent in their operation and valuable to the accused" must "occasionally give way to considerations of public policy and the necessities of the case."[99] This is such an occasion.[100]

Finally, this conclusion is consistent with *Crawford* and its progeny. Can a child who lacks the competency to testify really be thought to "bear testimony" against the accused? Would a child who lacks the competency to testify reasonably expect his statements to be used prosecutorially or at a later trial?[101] Would the reasonable child who lacks the competency to testify have intended his statements for use at a future trial?[102] No matter how the question is asked, the answer is the same. Statements made by children who lack the competency to testify are nontestimonial.

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[99] *Id.* at 243.

[100] "Dying declarations" and "forfeiture by wrongdoing" are two other occasions in which this "general rule" must give way to considerations of public policy and the nature of the case. *Giles*, 554 U.S. at 358-59 (plurality opinion). All three of these exceptions are firmly rooted in the common law and existed as a matter of necessity.

[101] *Crawford*, 541 U.S. at 51-52; *Melendez-Diaz*, 557 U.S. at 310.

[102] *Bryant*, 131 S. Ct. at 1156.

II. The Ohio Supreme Court erred in applying the primary purpose test in this case.

This Court has recognized that police officers serve the public in the dual capacity of both first responder and criminal investigator.[103] When an officer responds to an incident and begins to questions those present, it is not always apparent whether the responses elicited by his questions are testimonial. To assist lower courts in determining whether or not certain statements are testimonial, this Court developed what has become known as the "primary purpose test."[104] In light of its origin, the primary purpose test is well-suited to determine whether statements gathered during an interrogation of a witness to a criminal offense are testimonial.

In *Hammon*, *Davis*, and *Bryant*, this Court applied the primary purpose test to police interrogations that occurred while the police were actively investigating a reported crime (*Hammon*[105] and *Bryant*[106]) or were simultaneously being dispatched to investigate a crime

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[103] *Id.* at 1161.

[104] *Davis*, 547 U.S. at 822.

[105] *Davis*, 547 U.S. at 819. The *Hammon* interrogation occurred after police responded to the victim's home upon a report of a "domestic disturbance", found broken glass and a "somewhat frightened" victim, and questioned the victim separately from the defendant about what had occurred. *Id.* at 819-20.

[106] *Bryant*, 131 S. Ct. at 1150. The interrogation in *Bryant* took place after police officers were dispatched to a report that a man had been shot, found the gunshot victim lying on the ground at a gas station, and questioned him.

(*Davis*[107]). These previous applications of the primary purpose test stand in stark contrast to the facts in *Clark* involving preschool teachers seeing marks on the face of their very young student and asking him what had happened.[108]

The Ohio Supreme Court erred in its application of the primary purpose test in *Clark* because this Court has never implied, much less held, that the primary purpose test applies to conversations between private parties. Moreover, this Court has never suggested a mere duty to *report* suspected child abuse instantly transmutes educators into police interrogators. In applying the primary purpose test to those facts, the Ohio Supreme Court needlessly "strain[s] the text of the Confrontation Clause"[109] and extends it far beyond any possible intent of the Framers.

A. This Court has never suggested that the primary purpose test applies to conversations between private individuals.

While this Court has explicitly reserved judgment as to when, *if ever* statements between private parties implicate the Confrontation Clause, it has never suggested the primary purpose test should, or even

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[107] *Davis*, 547 U.S. at 817. The *Davis* interrogation between a domestic violence victim and a 911 operator occurred while the 911 operator was simultaneously gaining enough information from the victim to dispatch police to her. The operator was talking to the victim while, at the same time, dispatching law enforcement to investigate the crime. *Id.* at 817-18.

[108] *Clark*, 99 N.E.2d at 602.

[109] *White*, 502 U.S. at 364.

could, be used to evaluate statements between private parties.[110] In *Davis*, this Court held,

> "[S]tatements are nontestimonial when made in the *course of police interrogation* under circumstances objectively indicating that the primary purpose of the interrogation is to enable *police* assistance to meet an ongoing emergency. They are testimonial when the circumstances indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[111]

This holding both explicitly and implicitly recognizes that—at the very minimum—*police involvement* is a condition precedent for application of this test.

The primary purpose test was recently revisited by this Court in *Bryant*. The Court explained,

> "To determine whether the primary purpose of an interrogation is to enable police assistance to meet an ongoing emergency which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties."[112]

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[110] *Davis*, 547 U.S. at 823 n.2 (internal quotation marks omitted); 131 S. Ct. at 1155 n.3.

[111] *Davis*, 547 U.S. at 822 (emphasis added).

[112] *Bryant*, 131 S. Ct. at 1150 (internal quotation marks omitted).

Once again, the Court used the primary purpose test to evaluate statements elicited during *police interrogation*.[113] However, nothing in the opinion suggested the Court intended this test to be used to evaluate out-of-court statements between private parties. Rather, "police interrogation" continues to be the *sine qua non* for the application of the primary purpose test.

This limitation on the scope of primary purpose test is necessary as the test is a poor vehicle for evaluating the out-of-court statements of private parties, like those given by L.P. in this case. The test was developed to address the unique circumstances in which police interrogators interact with declarants.[114] Police act as both first responders and criminal investigators; an interrogation, viewed from the perspective of the police, is likely both to respond to the emergency and to gather evidence.[115] Similarly, in some circumstances the formality of the encounter and the dual capacity in which police officers serve may allow a reasonable declarant to suspect his statements will be used in a future criminal case. However, these dynamics, presupposed in the primary purpose test, are simply not present in the day-to-day interactions private citizens have with one another. These informal

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[113] *Id.* at 1157. "As our recent Confrontation Clause cases have explained, the existence of an 'ongoing emergency' at the time of an encounter between an individual and the police is among the most important circumstances informing the 'primary purpose' of an interrogation."

[114] *Id.* at 1161.

[115] *Id.*

encounters bear no relation to the interactions citizens have with law enforcement during a criminal investigation.

The Ohio Supreme Court has failed to appreciate the difference between a formal police interrogation and the informal questioning of L.P. by Whitley and Jones. In doing so they have expanded the reach of the Confrontation Clause far beyond the "discrete category" of formal testimony envisioned by the Framers and beyond the guidance of all post-*Crawford* cases.

B. Ohio's mandatory reporting statute does not convert teachers into police interrogators.

The Ohio Supreme Court's misapplication of the primary purpose test was, in part, predicated upon its erroneous belief that a duty to report child abuse converts private individuals into agents of law enforcement. Ohio, like every other state, has enacted a statute which requires certain individuals to report suspected child abuse to designated government entities.[116] The *Clark* holding improperly converted teachers and over forty other enumerated non-law enforcement occupations—from attorney, doctor, teacher, and counselor to "employee of an entity that provides homemaker services"[117]—into agents of law

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[116] Ohio Revised Code § 2151.421(A)(1)(a). A comprehensive listing of the reporting requirements of all state statutes can be accessed at www.childwelfare.gove/systemwide/laws_policies/statutes/manda.cfm (last accessed Nov. 20, 2014).

[117] § 2151.421(A)(1)(a).

enforcement based solely on their mandatory reporting status under Ohio Revised Code § 2151.421(A)(1)(b).

In Ohio, the duty to report suspected child abuse is placed upon individuals whom the legislature believes are uniquely situated through their "official or professional capacity" to "encounter and identify abused and neglected children" and who have "the necessary training or skill to detect the symptoms of child abuse."[118] The statute provides that no persons listed in R.C. § 2151.421(A)(1)(b)[119] "shall fail to immediately report [] knowledge or reasonable cause to suspect" "that a child under eighteen years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child."[120] The mandatory reporting duty is satisfied by an individual making a report "to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred."[121]

Perhaps as important as what Ohio's mandatory reporting statute requires is what it does not require. Nothing in the statute requires any *investigation* on the part of the reporter. As preschool teachers Whitley and Jones were unquestionably mandatory reporters; they were not, however, mandatory *investigators*.

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[118] *Yates v. Mansfield Bd. of Edn.*, 808 N.E.2d 861, 867 (2004).

[119] R.C. § 2151.421(A)(1)(b).

[120] R.C. § 2151.421(A)(1)(a).

[121] *Clark*, 999 N.E.2d at 597.

Nothing in the statute required them to ask L.P. "What happened?", "Who did this?", or any other questions. They did not ask these questions out of some imagined duty to investigate crimes. They asked these questions because they were conscientious teachers who cared about the welfare of their student.

The Ohio Supreme Court erred in its Confrontation Clause analysis; it simply misread the duty of the over forty classes of mandatory reporters under the statute. It deemed statutory reporters to be law enforcement interrogators. As the *Clark* dissent aptly points out "[t]he duty is to report knowledge or suspicion of abuse or neglect that the designated persons encounter while doing their work"[122] but "[t]he reporting statute *does not* impose a duty to ask questions about suspicious injuries or conditions or to undertake any investigation."[123] "In turn, the children's services agency or the police—not the mandatory reporters—are responsible for investigating the injury or condition."[124]

Where, as here, the teachers did inquire into the situation, this concern did not arise from the statutory duty to report, but rather from "a professional responsibility or concern for the child—to find out what

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[122] *Id.* at 609.

[123] *Id.*

[124] *Id.* "That any information received by one who is required to report may cause the state to initiate an investigation or may later by used by the state for another purpose—to prosecute a perpetrator—"does not change the fact that the statements were not made for the state's use" " (internal citations omitted). *Id.*

happened to the child."[125] As the *Clark* dissent states, "It would be negligent, if not reckless, for a teacher to fail to inquire about the source of newly inflicted, serious injuries on a small child in her care, irrespective of R.C. 2151.421."[126] Regardless of whether they had a statutory duty to report abuse, the questions asked by two preschool teachers of a three-year-old child bear no relation to a police interrogation.

In this case, the Ohio Supreme Court has effectively deputized doctors, attorneys, and a laundry list of other professionals, including L.P.'s preschool teachers. Having deputized them, the *Clark* court then held that the questions these teachers asked their injured student should be reviewed under the same standard as if they were elicited in a police interrogation.

Throughout the United States, there were 124,544 substantiated cases of physical abuse and 62,936 substantiated cases of sexual abuse against children in 2012.[127] Who can these children tell if not their own teachers? Due to *Clark*, doctors, coaches, counselors, and virtually every person a child might approach for help has been made the equivalent of a police interrogator in Ohio. While disastrous for the State of Ohio, the implications of the *Clark* decision cannot be overstated for the 18 states that have universal reporting requirements requiring *every citizen* to report

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[125] *Id.*

[126] *Id.*

[127] *Admin. For Children & Families, Dept of Health and Human Servs.,Child Maltreatment* 2012, Table 3-8, available at http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf.

suspected child abuse to the relevant authorities.[128] Should any of those states find *Clark* persuasive, the words of the neglected, beaten, and raped children too young to speak for themselves will simply never be heard at all. The children will be silenced, and justice will be denied. The *Clark* decision represents a grave error; an error with national ramifications and one that requires swift correction.

CONCLUSION

The *amicus curiae* respectfully requests this Court reverse the judgment of the Ohio Supreme Court and remand the case for proceedings consistent with this Court's decision.

Respectfully submitted,

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[128] *See supra* note 116.

AMICUS CURIAE BRIEF

No. 13-1352

In The Supreme Court Of The United States

STATE OF OHIO,

PETITIONER,

v.

DARIUS CLARK,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR THE STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, WEST VIRGINIA, WISCONSIN, WYOMING, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does an individual's obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?

2. Do a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

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INTEREST OF AMICI CURIAE

Child abuse is an all-too-common occurrence in this nation. Approximately 678,810 children were victims of child abuse in 2012, and an estimated 1,640 died that year as a result of abuse and neglect. U.S. DEP'T OF HEALTH & HUMAN SERVS., *Child Maltreatment* 2012 at xii (2013).[1] Every state has laws requiring professionals who frequently come in contact with children—including teachers, care providers, dentists, firefighters, and nurses—to report suspected abuse to child protective services agencies or law enforcement. A rigid rule classifying mandatory reporters as law enforcement agents and presuming that their primary purpose in speaking to injured children is to gather evidence for criminal prosecution sweeps far too many nontestimonial statements within the purview of the Confrontation Clause. As the states' chief law enforcement officers, the undersigned Attorneys General have an abiding interest in ensuring that the lower court's erroneous interpretation of the Confrontation Clause is rejected.

ARGUMENT

A. Statements Made to Individuals Who Are Not Law Enforcement Agents Are Rarely Testimonial

In *Crawford* and subsequent cases, this Court has addressed whether statements made to law enforcement officers were testimonial. *Crawford v. Washington*, 541 U.S. 36 (2004). In that situation the Court held that the Confrontation Clause applies to

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[1] *Available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf#page=13 (last visited November 4, 2014).

statements "procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011). The Court has reserved the question "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Davis v. Washington*, 547 U.S. 813, 823 n.2 (2006); *see also Bryant*, 131 S. Ct. at 1155 n.3 (internal quotation marks omitted) (also leaving open that question).

As Ohio explains, statements made to someone who is not a law enforcement agent will be testimonial only in the rarest of circumstances, such as when there is some level of police involvement in the exchange. *See, e.g.*, *State v. Hooper*, 145 Idaho 139, 176 P.3d 911 (2007) (child's videotaped statement was testimonial, when given to a nurse and forensic interviewer, while police officer observed from another room). Outside of these rare circumstances, statements made to private persons do not implicate the "principal evil at which the Confrontation Clause was directed," namely, "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50.

Historically, pretrial examinations of suspects and witnesses were conducted before trial by "justices of the peace or other officials." *Id.* at 43-44. Justices of the peace had an "essentially investigative and prosecutorial function." *Id.* at 53. The Court has found that "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England." *Id.* at 52. Police interrogations, "testimony at a preliminary hearing, before a grand jury, or at a formal trial" are "the modern practices with

closest kinship to the abuses at which the Confrontation Clause is directed." *Crawford*, 541 U.S. at 68. But unlike a formal statement to a police officer, a statement made to another private person will only rarely be made for the "primary purpose" of "creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155.

The first step in the Confrontation Clause analysis here, therefore, is to determine whether the obligation to refer suspicions of abuse to a social services agency transforms preschool teachers into law enforcement agents. For the reasons set out below, it does not.

B. Teachers Are Not "Law Enforcement" Agents Merely Because They Are Mandatory Reporters

1. Mandatory Reporter Laws Aim Primarily to Protect Children, Not Facilitate Prosecution

The Ohio Supreme Court assumed that a mandatory reporter's referral of suspicion of neglect, physical abuse, sexual abuse, or emotional abuse is the first step in an inevitable progression to prosecution. That is simply not so. By referring suspected abuse, mandatory reporters allow state social workers to determine what type of assistance or state intervention is needed to protect the child, if any. Most states allow reporters to make an anonymous call to a toll-free hotline. U.S. DEP'T OF HEALTH & HUMAN

SERVS., *Child Welfare Info. Gateway*.[2] Although prosecution is one possible outcome, mandatory reporters play a broader role in protecting children.

Of the 6.3 million children that were referred in 2012 to social services agencies as potential victims of abuse or neglect, only 3.2 million received a response from a child protective services office. ANNIE E. CASEY FOUNDATION, *On the Frontline: Improving Child Protective Services Investigations*.[3] When a mandatory reporter's suspicions are substantiated, social services agencies respond in the manner best suited to prevent a recurrence of the abuse. These strategies include assessment of the degree of risk to the child's safety and the specific strains on the family, such as poverty, drug abuse, and lack of parenting skills. U.S. DEP'T OF HEALTH & HUMAN SERVS., *Child Welfare Info. Gateway*.[4] Depending on the nature and severity of the problem, the response may concentrate on "what might happen in the future" rather than "an investigation that concentrates on determining whether maltreatment has already occurred." *Id.* To enable assistance to families to be effective, the states have a strong incentive to provide services as early in the child's life as possible.

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[2] *Available at* https://www.childwelfare.gov/pubs/reslist/rl_dsp.cfm?rs_id=5&rate_chno=W-00082 (last visited November 12, 2014).

[3] *Available at* http://www.aecf.org/blog/on-the-frontline-improving-child-protective-services-investigations/ (last visited November 12, 2014).

[4] *Available at* https://www.childwelfare.gov/pubs/usermanuals/neglect/chaptersix.cfm (last visited November 4, 2014).

Mandatory reporters play a vital role in alerting social services to the need for family support, before the situation devolves to a point that prosecution is necessary. Child care providers and mandatory reporters who work with children on a daily basis play an important role in alerting the state to signs of abuse early in a child's life. More than 60% of American children under the age of five are in a regular child care arrangement, where they spend an average of 33 hours a week. Lynda Laughlin, *Who's Minding the Kids?*, U.S. CENSUS BUREAU, Table 1 (2013).[5] Preschool teachers and child care providers thus have a unique opportunity to observe a young child's injuries or behavioral changes that may indicate abuse or neglect. Similarly, pediatricians, clergy, firefighters, and counselors have an opportunity to see signs of possible abuse while interacting with children and families. Requiring that such signs be reported provides a critical first line of defense in the states' efforts to aid families, and prevent the need for eventual prosecution or termination of parental rights.

2. There Is No Reason to Treat Most Mandatory Reporters As "Law Enforcement"

In marked contrast to police officers, mandatory reporters of child abuse do not have an investigative or prosecutorial function. Rather, they are professionals that come into contact with children in the course of their daily job duties. A mandatory reporter may notice signs of abuse while cleaning a

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[5] *Available at* http://www.census.gov/prod/2013pubs/p70-135.pdf (last visited November 4, 2014).

child's teeth, caring for a child at daycare, or performing a regular pediatric check up. When there are signs of abuse, mandatory reporters are required only to refer the suspicion to a child services agency, so that an investigation can be carried out by the social services agency or the police. To this end, Ohio requires mandatory reporters with knowledge that a child "has suffered or faces a threat of suffering" any physical or mental injury to "immediately" inform the public children services agency or the police by telephone or in person. Ohio Rev. Code § 2151.421.

The requirement that suspicions be referred to a social services agency does not deputize mandatory reporters into law enforcement agents responsible for investigating and gathering evidence. To the contrary, that responsibility is specifically entrusted to state child protective services agencies and the police. A mandatory reporter's responsibilities stop after their suspicions are shared with child protective services. In fact, if a mandatory reporter asks probing questions, it "can harm subsequent [child protective services] or legal processes." U.S. DEP'T OF HEALTH & HUMAN SERVS., *The Role of Professional Child Care Providers in Preventing and Responding to Child Abuse and Neglect* (2008).[6]

The responsibility for investigation in Ohio lies with the public children services agency. When a teacher suspects abuse, the Ohio public children services agency is statutorily required to conduct an investigation within 24 hours. After completing its investigation, the agency makes a recommendation to

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[6] *Available at* https://www.childwelfare.gov/pubs/usermanuals/childcare/chapterthree.cfm (last visited June 4, 2014).

the prosecutor. Ohio Rev. Code § 2151.421(F). The other states' systems operate similarly. Child protective services or the police are responsible for investigating allegations of abuse or neglect. *See, e.g.*, Wash. Rev. Code § 26.44.050; Tex. Fam. Code Ann. § 261.301(a); 325 Ill. Comp. Stat. 5/7.4. Child services agencies screen the referrals and employ specially trained persons to question children after notice of possible abuse is received and determine whether the allegation is founded. The agency determines whether the family needs assistance or intervention by social services, and whether it is necessary to refer the matter to the police. Since no state deputizes mandatory reporters or requires that they conduct an investigation, characterizing them as law enforcement agents verges on the outlandish.

3. L.P.'s Caregivers Were Not Acting As Law Enforcement Agents When They Spoke to Him

This case illustrates the non-law-enforcement nature of interactions between teachers, doctors, nurses, and other mandatory reporters and injured children. The exchange took place in a preschool. In a preschool or child care setting, the teachers' primary responsibility is to protect the health and safety of the children in their care. It is common for children to receive injuries during the normal course of their play. U.S. DEP'T OF HEALTH & HUMAN SERVS., *Role of Professional Child Care Providers in Preventing & Responding to Child Abuse and Neglect* (2008).[7] Teachers must also observe children for

[7] *Available at* https://www.childwelfare.gov/pubs/usermanuals/childcare/chaptertwo.cfm (last visited June 4, 2014).

signs of illness. If members of the general public were asked what purpose the teachers had here in asking the questions, virtually all would respond that they sought to ensure the wellbeing of the child and discover whether there were classroom bullies.

This is precisely what L.P.'s teachers sought to do. The situation "must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight." *Bryant*, 131 S. Ct. at 1157 n.8. At the time the teachers saw L.P.'s blood-stained eye and the whip-like marks on his face, they did not know the extent of his injuries, whether he had been hurt at the school, who had hurt him, or whether a hazard at the preschool caused him to fall and posed an immediate threat to other children. The questions exclaimed by the teachers—"whoa, what happened?" "how did you fall and hurt your face" and "who did this?"—were objectively necessary to evaluate the situation. In contrast to the formal, deliberate interrogations at issue in *Crawford* and *Hammon*, the questions posed to L.P. were a spontaneous reaction to the sight of his injuries. The teachers' questions—which were asked in the informal setting of the school lunch room and the classroom—were those of caregivers, not enforcers of the law.

Once the teachers determined that L.P. did not need medical attention, and had not been hurt at the preschool, the questions ended. Indeed, it is difficult to imagine how Jones and Whitley could have asked any fewer questions to fulfill their need to determine whether L.P. was being harmed at the preschool or needed medical help. As soon as they realized that the harm was not caused by another child

or a hazard at the preschool, and that L.P may have been abused, the questioning stopped and a phone call was made to the county children and family services agency. Pet. App. 4a. The teachers did not seek to obtain even the most elementary information that would be needed for trial—such as when the abuse occurred, how the abuse was inflicted, where the child was when the abuse occurred, or whether there were witnesses present. The police did not participate in the questioning, were not present during the questioning, and did not ask the preschool teachers to ask any questions. Neither the police nor the child services agency had any knowledge of the questioning at the time it was performed.

The informal questioning of L.P. bears no resemblance to the type of formal statements to law enforcement that have been found to implicate the confrontation right. *See Bryant*, 131 S. Ct. at 1155; *Davis*, 547 U.S. at 825-826, 827, 830; *Crawford*, 541 U.S. at 51-52 ("core class" of statements implicating the Confrontation Clause "is contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions"). In responding to the situation at hand, the teachers had no opportunity to plan or construct questions designed to elicit anything more than the barest information, much less to structure their questions in a manner designed to prompt L.P. to provide information for use in a criminal trial.

C. Even if Mandatory Reporters Qualify as "Law Enforcement," a Young Child's Statements to Them Will Rarely Qualify as Testimonial, and Certainly Do Not Here

Even if the duty to refer suspicions of abuse transforms mandatory reporters into law enforcement, young children's statements to mandatory reporters will rarely be testimonial. Under the "primary purpose" test applicable to statements made to law enforcement agents, a statement is testimonial if, viewed from the perspective of both the declarant and the questioner, it was planned or calculated to "'establish or prove past events potentially relevant to later criminal prosecution.'" *Bryant*, 131 S. Ct. at 1160 (quoting *Davis*, 547 U.S. at 822). That will rarely be the case as to young children's statements to mandatory reporters. As described above, mandatory reporters are not investigating or seeking to preserve testimony of past events when they spontaneously question a child about injuries. And an objective witness would not expect a young child to have any ability to comprehend that his informal answers would be used at trial.

1. Mandatory Reporters Such as Preschool Teachers Rarely Ask Questions of Injured Students for the Purpose of Obtaining Substitutes for Trial Testimony

The most fundamental flaw in the Ohio Supreme Court's decision was its creation of a strict dichotomy: questions either "deal with an existing emergency" (in which case they are not testimonial)

or they "gather evidence potentially relevant to a subsequent criminal prosecution" (in which case they are testimonial). Pet. App. 9a. In the court's view, once it found that no emergency existed (a questionable proposition in itself), it necessarily followed that the teachers' primary purpose was to "establish[ ] past events potentially relevant to a later criminal prosecution." Pet. App. 3a. But rigidly classifying all encounters as either an emergency or an interrogation to gather information for trial distorts the primary purpose test in a manner that "creates a beneficial catch-22 for pedophiles and other abusers of children." Pet. App. 46a (O'Connor, J., dissenting).

Unlike the Ohio Supreme Court, this Court has expressly chosen *not* to create two classifications for out-of-court statements, as either emergencies or testimonial statements. *Bryant*, 131 S. Ct. at 1155; *Davis*, 547 U.S. at 822. As *Bryant* explained, "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." 131 S. Ct. at 1155. The context and purpose of out-of-court statements must be examined to determine whether the statements "evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial." *Id.*

When a police officer responds to an emergency, the "emergency focuses the participants on something other than 'prov[ing] past events potentially relevant to later criminal prosecution.'" *Id.* at 1157 (quoting *Davis*, 547 U.S. at 822). The same logic applies when the Confrontation Clause is applied to

mandatory reporters. A mandatory reporter may be told something that raises a suspicion of abuse while the mandatory reporter and the child are focused on the adult's professional duties—extracting a tooth, teaching Sunday school, injecting childhood vaccines, or providing child care. In such situations, the mandatory reporter's spur-of-the-moment, unstructured questions are comparable to a police officer's questions during an emergency. The focus of the adult and the child is on the immediate situation, not on an interrogation to preserve testimony for use in a criminal trial.

As discussed in section (B)(3) above, viewed objectively, the exchange between L.P and his teachers was focused on the teachers' professional obligation to assess the risk of harm to L.P. and the other children. That is what preschool teachers do every day; their focus is not on future criminal prosecutions. The questions were "informal and spontaneous" and were asked "on the spot in the classroom" and lunchroom, rather than in a police station or on a 9-1-1 call. Pet. App. 40a. And as this Court explained in *Bryant*, the informality of the encounter, while not dispositive, "informs" the primary purpose inquiry and militates against finding that the primary purpose was to prove past events in anticipation of later prosecution. *Bryant*, 131 S. Ct. at 1160.

To be sure, L.P.'s teachers had a duty to report suspected abuse and were presumably aware of that duty when they asked L.P what happened. As this Court has recognized, "dual responsibilities may mean that [interrogators] act with different motives simultaneously or in quick succession." *Bryant*, 131 S. Ct. at 1161. When an interrogator has dual pur-

poses, the *primary* purpose still must be objectively ascertained by focusing on the understanding, statements, and actions of all of the participants. *Id.* at 1161-1162. And that brings us back to the commonsense inquiry of why a reasonable teacher would ask a bruised child what happened: to address the child's health and safety and ensure classroom order, or to "creat[e] an out-of-court substitute for trial testimony"? Given the limited role teachers have in the law enforcement process—not to investigate, but merely to refer suspicions to others—and their continual, routine obligation to care for their students, the answer is self-evident.

2. L.P.'s Statements Were Not Made with Testimonial Intent

In addition to failing to analyze the context of the encounter, the Ohio Supreme Court failed to undertake "a combined inquiry that accounts for both the declarant and the interrogator." *Bryant*, 131 S. Ct. at 1160; *see also id.* at 1168 (Scalia, J., dissenting) ("[t]he declarant's intent is what counts"). As the Court has emphasized, "what was *asked and answered*" must be viewed objectively to determine the purpose of the questioning. *Id.* (citing *Davis*, 547 U.S. at 827). Focusing solely on the interrogators' purpose, the Ohio Supreme Court ignored the requirement that it also consider the declarant's purpose.

Viewed objectively, a young child's purpose in answering his teacher's questions lacks any intent or comprehension that the answers could be used at trial. In responding to the teachers' questions, L.P. was not "'bear[ing] testimony'" as a witness. *Bryant*,

131 S. Ct. at 1153-54 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). The three-year-old boy did not make "'a solemn declaration or affirmation for the purpose of establishing or proving some fact.'" *Id.* Nor is there any indication that L.P. intended to create evidence for Clark's trial. His short answers did not volunteer anything more than the minimal amount required of him. He stated only that he fell, Dee did it, and Dee is big. Pet. App. 20a-21a. And even if L.P. had provided more information, a three-year-old child is highly unlikely to have even a rudimentary understanding of the legal system and would not understand that his answers could lead to or be used in a criminal trial. Because L.P.'s statements were not testimonial, the confrontation right was not implicated.

D. The Ohio Supreme Court's Misinterpretation of the Confrontation Clause Adds Unnecessary Barriers to State Prosecutions of Child Abuse

Construing the Confrontation Clause to bar the admission of statements children informally make to mandatory reporters of abuse will greatly impair states' ability to protect children by successfully prosecuting abusers. As the dissenting judge below cautioned, the Ohio Supreme Court's opinion prohibits "[t]he very people who have the expertise and opportunity to recognize child abuse" from testifying to out-of-court statements when the child is unable to testify. Pet. App. 46a (O'Connor, C.J., dissenting). The costs of that rule are immense.

This Court has recognized that "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are not witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). A child's feelings of vulnerability and guilt make it particularly difficult to come forward when a parent is the abuser. *Id.* The absence of witnesses, and often a lack of physical or scientific evidence of the crime or identity of the perpetrator, make the child's initial statements particularly important. Robert P. Mosteller, *Confrontation in Children's Cases: The Dimensions of Limited Coverage*, 20 J.L. & Pol'y 393, 394 (2012).

Evidence from caregivers is often critical to the prosecution of these difficult cases. In 2012, nearly 27% of child abuse victims were younger than three-years old and 20% were in the three-to-five-year range. U.S. DEP'T OF HEALTH & HUMAN SERVS., *Child Maltreatment 2012* at 19 (2013).[8] When a young child is unable to testify regarding physical or sexual abuse, the testimony of a trusted care provider may offer the only means of allowing the child's voice to be heard at trial.

The severe limitation the Ohio Supreme Court's rule places on prosecutions would impact cases involving other mandatory reporters of suspected abuse as well. State laws mandating who must report abuse include a wide variety of professionals that come into contact with children, including nurses, doctors, dentists, firefighters, school personnel, and members of the clergy.

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[8] *Available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf#page=19 (last visited November 4, 2014).

Eighteen states require that *any* person who suspects child abuse must report it. *See* Pet. App. 38a n.4. Mandatory reporters submit more than three-fifths of the reports of suspected abuse received annually by state child protective services. U.S. DEP'T OF HEALTH & HUMAN SERVS., *Child Maltreatment 2012* at xi (2013).[9] Since every state has enacted laws requiring the mandatory reporting of child abuse, adoption of the Ohio Supreme Court's reasoning would severely impede child abuse prosecutions nationwide.[10]

CONCLUSION

The judgment of the Supreme Court of Ohio should be reversed.

RESPECTFULLY SUBMITTED.

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[9] *Available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf#page=22 (last visited November 4, 2014).

[10] *Available at* https://www.childwelfare.gov/systemwide/laws_policies/state/index.cfm?event=stateStatutes.processSearch (last visited November 4, 2014).

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